Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CINDY L. MCNAUGHTON,

Petitioner,

vs.

UNITED HEALTHCARE SERVICES, INC., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the exclusion contained in § 1 of the Federal Arbitration Act exempts from arbitration all employment contracts, including an arbitration clause determined to be a contract which is contained in an employee handbook?

2. Whether § 2 of the Federal Arbitration Act prohibits enforcement of a lone arbitration clause which does not arise out of a contract?

3. Whether binding employees to arbitration agreements contained with an at-will employment document is violative of Petitioner's constitutional rights to trial by jury and due process?

PARTIES TO THE PROCEEDING

1. Cindy L. McNaughton
2. United HealthCare Services, Inc.
3. Tony DeRico

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CITATIONS OF REPORTS OF OPINIONS

1. *McNaughton v. United HealthCare Services, Inc., et al.*, No. 97-2058 (Supreme Ct. of Ala. March 5, 1999) (denial of rehearing).

2. *McNaughton v. United HealthCare Services, Inc., et al.*, No. 97-2058, 1998 WL 544926 (Ala. Aug. 28, 1998).

3. *McNaughton v. United HealthCare Services, Inc., et al.*, No. 97-2058 (Jeff. Co. Cir. Ct. August 8, 1997) (order directing the petition for writ of mandamus to be directed to Honorable Jack D. Carl, Judge of the Circuit Court of Jefferson County).

4. *McNaughton v. United HealthCare Services, Inc., et al.*, No. 97-2058 (Jeff. Co. Cir. Ct. June 13, 1997) (order granting motion to stay).

STATEMENT OF JURISDICTION

Jurisdiction, pursuant to 28 U.S.C. § 1257, is premised on the fact that the Alabama Supreme Court, the state court of last resort, has decided an important federal question in a way that conflicts with the decisions of other state courts and United States courts of appeals. On August 28, 1998, the Supreme Court of Alabama entered an Order denying Plaintiff McNaughton's Petition for Writ of Mandamus. McNaughton made application for rehearing on September 11, 1998. The application for rehearing was overruled on March 5, 1999.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

1. "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. Federal Arbitration Act, 9 U.S.C. § 1 (1994).

2. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. Federal Arbitration Act, 9 U.S.C. § 2 (1994).

3. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

4. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

5. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

STATEMENT OF THE CASE

FACTS

On August 28, 1998, the Supreme Court of Alabama decided in *Ex Parte Cindy L. McNaughton*, 1998 WL 544926 (Ala. Aug. 28, 1998), that an employee who signed an acknowledgement form contained in an employee handbook containing an arbitration clause had entered into a binding employment contract compelling arbitration. Although the handbook specifically stated that it did not create a contract for employment and the employment was at will, the Court allowed for the arbitration clause alone to create the only binding portion of an employment contract. Besides obliterating all principles of contract law which had existed within the State for over one hundred years, the Court's decision allows an employer to effectively require his employee to "sell" his civil rights in exchange for at-will employment.

The Petitioner, Cindy McNaughton, had been hired by the Respondent, United HealthCare, in July, 1996, in Montgomery, Alabama. United HealthCare's Code of Conduct and Employee Handbook Acknowledgment form were given to McNaughton at that time. The form, attached hereto as Exhibit "A," provides in pertinent part:

> **At-Will Employment**
>
> I understand that the provisions in this Handbook are guidelines and, except for the provisions of the Employment Arbitration Policy, **do not establish a contract** or any particular terms

> or condition of employment between myself and UHC. None of the policies constitute or are intended to constitute a promise of employment. I further understand that UHC may periodically, at its discretion, change, rescind, or add to any policies, benefits or practices with or without prior notice.
>
> I understand that the employment relationship is "at will" and is based upon the mutual consent of myself and UHC. Accordingly, I agree that UHC or I may terminate the employment relationship at any time and for any reason, with or without notice or prior discipline.

In October, 1996, McNaughton was transferred to a new position and given a substantial salary increase. In February, 1997, McNaughton interviewed for another position within the company which would require her to transfer to United HealthCare's Birmingham, Alabama office. At the close of the interview, McNaughton was offered the position and was asked when she could begin work. When she stated that she would have to notify the Montgomery office, she was told her new supervisor would handle it so she could begin as soon as possible. In reliance on these representations, McNaughton notified United's Montgomery office that she would be transferring to Birmingham, forfeited her lease deposit in Montgomery, sold her furniture and moved to Birmingham.

On March 15, 1997, McNaughton picked up reading materials from the Birmingham office to prepare for her new position. But on March 17, 1997, McNaughton was contacted by United's Human Resources department and informed that her position had been filled by a more qualified applicant.

McNaughton attempted to utilize United's internal dispute resolution process to resolve the problem, but United would only agree to reimburse her mileage for commuting from Birmingham to Montgomery and her lost lease deposit. McNaughton was forced to take a job elsewhere with a reduced salary and fewer benefits. She filed a complaint in the Circuit Court of Jefferson County, Alabama, on April 7, 1997, alleging fraud and intentional interference with business relations.

On April 27, 1997, United HealthCare and the other named defendants filed a motion to stay further proceedings pursuant to the Federal Arbitration Act. The motion was heard before Judge Jack Carl on May 5, 1997, and the judge granted the Defendants' Motion to Stay all proceedings based on the alleged arbitration agreement. McNaughton petitioned the Supreme Court of Alabama for a writ of mandamus on July 14, 1997, arguing that the arbitration clause was not part of a contract and was not mutually binding. At this point, Petitioner raised the issue that the arbitration clause was not a written provision in a contract and was therefore not enforceable pursuant to the FAA. The Court denied the Petition on August 28, 1998, holding that McNaughton's signed acknowledgment form created a contract based on one provision – the arbitration policy and that neither lack of mutuality nor unconscionability would void the contracts. The majority quoted *Gilmer v. Interstate/Johnson Lane Corp.*, where this Court stated that, "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." 500 U.S. 20, 33 (1991). *Court Opinion, App. 13.*

Justice Almon dissented from the Supreme Court of Alabama's decision stating the "contract" involved was an adhesion contract as it "attempts to force an employee to surrender constitutional rights." *Court Opinion, App. 18-19.* Almon noted that the employer gave itself the option to invoke specific performance, but did not afford the same remedy to the employee. *Court Opinion, App. 20.* Almon looked to the plain language of the FAA, especially § 1, and the original purpose of the Act to argue that the FAA should not be applied to an employment contract. *Court Opinion, App. 21.* Justice Almon addressed constitutional issues and asked, "How can the Supreme Court, ignoring the Seventh and Tenth Amendments and state constitutional guarantees of the right of trial by jury, construe an act of Congress beyond its original intent in such a way as to prevent citizens of the United States and the states from exercising their constitutional right to litigate in Court?" *Court Opinion, App. 23.*

Justices Ralph Cook and Janie Shores dissented and in their separate opinion stated that United HealthCare's promise was illusory, therefore the contract was unenforceable because there was no mutuality of obligation. *Court Opinion, App. 26-33.* The Justices emphasized that under contract law, the agreement between Cindy McNaughton and United Healthcare was an illusory, unilateral contract which would not be an enforceable contract pursuant to the FAA. *Court Opinion, App. 26-33.*

McNaughton made application for rehearing on September 11, 1998, arguing that: 1) the arbitration clause is void and unenforceable based on contract law; 2) the

arbitration agreement is violative of McNaughton's constitutional rights as guaranteed by the United States Constitution and the Constitution of Alabama (1901); 3) the arbitration clause was not included within a "contract" as required by the FAA; and, 4) McNaughton's signing the acknowledgment and receipt of employment guidelines did not constitute a knowing and voluntary relinquishment of civil rights. The application was overruled without opinion on March 5, 1999.

ARGUMENT

INTRODUCTION

"Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."

> *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983) (dissenting opinion).

Those words, written by this Honorable Court in 1983, have been repeatedly quoted, time after time, in each of the fifty states, among the federal courts of appeals, and in the dubious opinion rendered by the Alabama Supreme Court. *See e.g., Dickinson v. Heinold Sec., Inc.*, 661 F.2d 638, 643 (7th Cir. 1981); *Wick v. Atlantic Marine, Inc.*, 605 F.2d 166, 168 (5th Cir. 1979); *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, 585 F.2d 39, 43-45 (3rd Cir. 1978). In fact, the lower tribunals now seem to consider only those words and not the actual language of the FAA or its construction. On any issue which has not been specifically spelled out by this

Court, the lower courts have gone to extremes – extending the FAA far beyond its original purpose, elevating it in status beyond any Constitutional or inalienable rights.

In particular, the Alabama Supreme Court, since being reversed by this Court in *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995), has upheld arbitration clauses in virtually every conceivable context – a drastic upheaval in a state where existing laws disfavor binding arbitration clauses as a matter of public policy. *See Ala. Code* § 8-1-41(3) (1975).

This Court has remained silent far too long as to the FAA's applicability to employees and their employers. The Court's refusal to address this issue has allowed for a great divergence of opinion among the fifty states' highest courts and among the federal appellate courts. The lower courts have failed to consider the constitutional concerns of individual employees, but in an attempt to strongarm the federal presumption in favor of arbitration have ridden roughshod over those rights and liberties originally secured to all who would abide in this great nation.

It is now time for the Court to pierce the silence, and as Supreme Court of Alabama Justice Almon said in his dissenting opinion, "patch our Liberty Bell and ring it again for all to hear!" *Court Opinion, App. 26.* This Court must provide the direction so that our lower courts will return to a jurisprudentially sound consideration of the FAA where the courts interpret the plain language and intent of the FAA holding intact prevailing constitutional rights and liberties which were in existence long before the FAA and are the lifeblood of this great nation.

WHEREFORE, Petitioner petitions this Honorable Court for a Writ of Certiorari urging this Court to decide once and for all that an employer will not be allowed to force employees to relinquish rights previously and historically guaranteed to citizens of the United States by binding employees with arbitration agreements that should not be enforceable based on a plain reading of the Federal Arbitration Act.

I. THIS HONORABLE COURT SHOULD INTERPRET § 1 OF THE FEDERAL ARBITRATION ACT IN ORDER TO RESOLVE CONFLICTING DECISIONS AMONGST THE FEDERAL APPELLATE COURTS AND THE HIGHEST COURTS OF THE FIFTY STATES.

This Court has heretofore left undecided the interpretation of § 1 of the Federal Arbitration Act, which provides that, "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. In *Gilmer v. Interstate/Johnson Lane Corp.*, this Court opted not to interpret § 1 although the issue was presented by several amicus curiae in support of Gilmer. The court left the issue for another day, stating "it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment." *Gilmer*, 500 U.S. 20, n.2 (1991). Thus, in the years following *Gilmer*, the United States courts of appeals and the highest courts of the fifty states have adopted conflicting viewpoints regarding how § 1 should be interpreted.

In the case now before the Court, the Supreme Court of Alabama cited the *Gilmer* decision as its authority for deciding the McNaughton arbitration agreement was not unconscionable. Like many other courts, the Supreme Court of Alabama did not distinguish that the arbitration agreement in *Gilmer* was not contained in a contract of employment. *See Patterson v. Tenet HealthCare, Inc.*, 113 F.3d 832 (8th Cir. 1997); *Great West. Mortgage Corp. v. Peacock*, 110 F.3d 222 (3rd Cir. 1996).

In order to resolve this conflict once and for all, the Court should now establish that courts should decide cases based on the plain language of the FAA. This Court should begin by clarifying that § 1 of the FAA prohibits the lower courts from compelling arbitration in cases involving employment contracts. Several circuits and some state courts have erroneously construed the § 1 exclusion "as limited to those employees involved or closely related to the actual movement of goods in interstate commerce." *See Nwogugu v. Painewebber, Inc.*, 125 F.3d 841 (1st Cir. 1997). This very limited interpretation has been based on a limited and erroneous interpretation of the construction of § 1.

In *Tenney Eng'g, Inc. v. United Elec. Radio and Mach. Workers of America Local 437*, 207 F.2d 450 (3rd Cir. 1953), the Third Circuit held that § 1 of the Arbitration Act was intended only to exempt that class of workers who engaged directly in interstate or foreign commerce. The Court held that based on the rule of *ejusdem generis* the language of the statute would be interpreted to include only the class of workers who are actually engaged in the movement of interstate or foreign commerce or work so closely related thereto to have a practical effect on it. In

his dissenting opinion, Circuit Judge McLaughlin pointed out why application of the rule of *ejusdem generis* was erroneous. Justice McLaughlin stated that, "since the intention of Congress manifestly was to confine the act to commercial disputes, *ejusdem generis* has no possible relevancy here. As said in *Gooch v. United States*, 297 U.S. 124, 128 (1936), 'it (the rule of *ejusdem generis*) may not be used to defeat the obvious purpose of legislation.' " Justice McLaughlin correctly pointed out that Congressional intent would be more properly ascertained by placing emphasis on the words "contracts of employment" rather than narrowly construing the phrase "workers engaged in interstate commerce."

The Second Circuit, following the Third Circuit's lead in *Tenney*, held in *Signal-Stat Corp. v. Local 475, United Electrical Radio and Mach. Workers of America*, 235 F.2d 298 (2nd Cir. 1956), that due to the universal approval of arbitration, the courts should interpret the arbitration act so as not to impede arbitration. Thus, the court concluded that § 1 should be construed to exempt only those employees who are actually engaged in the manufacture of goods for interstate commerce. Although the court recognized itself that "the Supreme Court has not yet interpreted the exclusionary clause in § 1, and the decisions of the lower Federal courts are in irreconcilable conflict," the Second Circuit opted to follow the Third Circuit's opinion without drawing any conclusions as to proper interpretation of the statute or the legislative intent.

Again, in *O'Neal v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997), the Fourth Circuit followed suit merely

stating that "if Congress had wished to exempt all employees from the coverage of the FAA, it could have said so." Thus, another circuit merely followed the erroneous interpretations of the Third Circuit without ascertaining congressional intent or statutory construction for itself. The Fifth, Seventh and Eleventh Circuits likewise followed suit without stating specific reasons or delving into their own interpretations of the statutory language or the plain intent of Congress. *See Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Int'l Union of Operating Eng'rs, Local Number 841 v. Murphy Co.*, 82 F.3d 185 (7th Cir. 1996); *Miller v. Pub. Storage Management, Inc.*, 121 F.3d 215 (5th Cir. 1997).

On the contrary, the Ninth Circuit in *Craft v. Campbell Soup Co.*, 161 F.3d 1199 (9th Cir. 1998), delved into a lengthy analysis regarding interpretation of the terms used in the FAA. The court noted that the FAA was not a modern statute and contemporary understandings of the terms used therein would not render a proper interpretation. The court pointed out that the legislative history of the FAA indicates that "the Act's purpose was solely to bind merchants who were involved in commercial dealings." *Craft*, 161 F.3d at 1203. The Ninth Circuit summarily dismissed the *Tenney* court's interpretation based on the rule of *ejusdem generis* quoting the dissent and stating that, "both the legislative history and the contemporary meaning of the commerce clause at the time of the FAA's enactment demonstrate the obvious scope and purpose of the FAA, which *ejusdem generis* cannot be used to defeat." *Id.* at 1204. The Ninth Circuit looked to the fact that the Supreme Court has never definitively ruled on

whether the FAA applied to employment contracts and stated that "there have been indications from the Supreme Court, albeit no more than indications, that the FAA does not apply to employment contracts." *Id.* at 1204. The Ninth Circuit cited this court's decisions in *Textile Worker's Union v. Lincoln Mills*, 353 U.S. 448 (1957), *Gilmer v. Interstate Johnson Lane Corp., supra*, and *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995), and held that "based on the wording of § 2, the pre-new deal understanding of the commerce clause, the legislative history of the FAA, and the suggestions gleaned from *Lincoln Mills, Gilmer*, and *Terminix*, we hold that the FAA does not apply to labor or employment contracts." *Id.* at 1206. The Ninth Circuit decision was based on an insightful interpretation of legislative history and the plain language of the FAA as well as the Ninth Circuit's interpretation of this Court's previous decisions. As such, the Ninth Circuit made the most logical decision regarding the interpretation of § 1 in holding that § 1 excludes from the FAA any and all employment contracts.

This Court should now go beyond its prior indications that the FAA would not apply to employment contracts, and following the reasoning of the Ninth Circuit, should delineate once and for all for the lower courts that the ~~plain~~ language of § 1 requires that all employment contracts be excluded from the Federal Arbitration Act.

II. A PLAIN READING OF § 2 OF THE FAA ALSO DEMONSTRATES THAT UNITED HEALTHCARE'S POLICY IS NOT BINDING BECAUSE IT IS NOT INCLUDED IN A CONTRACT.

The FAA purports to govern a written provision in any " . . . ***contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such contract . . .*** " 9 U.S.C. § 2 (1994) (emphasis added). The problem presented in the present case is that the arbitration clause at issue is not contained within a "***contract.***" United HealthCare's Employment Handbook stated specifically that the relationship between McNaughton and United HealthCare was that of at-will employment. ***It is not contractual.*** Consequently, the arbitration clause was not contained within a contract and would not meet the threshold requirements of § 2. The Employee Handbook specifically stated:

> The provisions in this handbook are guidelines and . . . do not establish a contract or any particular terms or condition of employment between myself and UHC. None of the policies constitute or are intended to constitute a promise of employment. I further understand that UHC may periodically, at its discretion, change, rescind, or add to any policies, benefits or practices with or without prior notice. I understand that the employment relationship is "at will" and is based upon the mutual consent of myself and UHC.

Where there is no presumptively valid general contract, the Court's duty to compel arbitration pursuant to the Federal Arbitration Act is not triggered. *Chastain v.*

Robinson-Humphrey Co., Inc., 957 F.2d 851 (11th Cir. 1992). A contract does not exist between Cindy L. McNaughton and United HealthCare Corporation, and as such, the arbitration clause is not a valid and enforceable arbitration agreement under the FAA.

In *Chastain*, the Eleventh Circuit held that because there was no presumptively valid general contract, the District Court was not required to compel arbitration pursuant to the Federal Arbitration Act. *Chastain*, 957 F.2d 851. *Chastain* involved a plaintiff who had not actually signed the contract that was the basis of the arbitration claim. *Id.* In the present case, Plaintiff signed an acknowledgment form, not a contract. The arbitration clause is not part of a valid contract, and standing alone it does not constitute a contract between Plaintiff and Defendant United HealthCare Corporation.

The Supreme Court of Alabama held that the arbitration agreement standing on its own is the contract. However, such a position belies the plain language in § 2. An underlying contract must exist to satisfy the language of § 2 of the FAA. Moreover, to come under § 2, the controversy triggering the arbitration clause must arise "out of such contract." Here, the arbitration clause arose out of the employment relationship. The employment relationship is ***not contractual***. Finding that the arbitration clause is the only enforceable agreement in the employment handbook flies in the face of the plain language of § 2 of the FAA.

The Alabama Supreme Court's decision upholding an arbitration clause in the absence of a binding contract likewise conflicts with the decisions of this Court. In

every case, construing the applicability of the FAA where an arbitration provision was enforced, this Court dealt with a "contract." *See Allied-Bruce Terminex Cos., Inc. v. Dobson*, 524 So. 2d 77 (Ala. 1995); *Robert Frank McAlpine Architecture, Inc. v. Heilpern*, 712 So. 2d 738 (Ala. 1998).

The Alabama Supreme Court inexplicably found the absence of a contract to be immaterial. The *only* enforceable element in Petitioner's transaction was the arbitration provision, as the Alabama Court illogically concluded. Such a tortured interpretation of the FAA cannot be sustained. If there is no "contract," the arbitration clause cannot be enforced. This elementary principle escaped the wisdom of the Alabama Supreme Court.

III. UNITED'S ARBITRATION CLAUSE IS VIOLATIVE OF McNAUGHTON'S RIGHTS GUARANTEED BY THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF ALABAMA.

Cindy McNaughton was entitled to all rights secured to her by the Constitution of the United States and its Amendments long before the Federal Arbitration Act was ever enacted. The majority's opinion never once takes into consideration the constitutional rights discarded as a consequence of its opinion.

Before Cindy McNaughton was ever employed by United HealthCare, she had the following constitutional rights: (1) the right to a trial by jury as guaranteed by the United States Constitution, Amendment VII; (2) the right to due process of law as guaranteed by the United States Constitution, Amendment V; and, (3) the right to equal

protection under the law as guaranteed by the United States Constitution, Amendment XIV. Petitioner does not contend that individuals can *never* prospectively waive their constitutional rights by executing documents. However, to conclude that Petitioner waived her constitutional rights by signing an acknowledgment form and to surmise that she intended to be bound to an arbitration agreement with no underlying contract and no rights and benefits conferred to her is preposterous. There was no *quid pro quo*. Petitioner apparently sacrificed her constitutional rights in a situation in which she could be terminated at any time and for any reason.

As this Court noted in 1956 in *Bernhardt v. Polygraphic Co. of America*:

> [T]he remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and by Ch. 1, Art. 12th, of the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial – all as discussed in *Wilko v. Swan*, 346 U.S. 427, 435-438 [(1953)].

350 U.S. 198, 203 (1956). No party should be forced to forego these rights without having legitimately waived

those rights by contract. To construe McNaughton's acknowledgment form so liberally as to find a contract is to make a mockery of the very purpose and intent of the Federal Arbitration Act. The Act was originally adopted by Congress to allow for merchants, shippers and other sophisticated parties who were engaged in commercial and business activities to agree, in bargained-for contracts, to submit their disputes to binding arbitration. An employee handbook forced upon potential employees as a condition of employment can hardly be considered a bargained-for contract. As the Michigan Supreme Court wisely concluded when faced with the argument that an employee is free to seek other employment rather than enter into the agreement contained in an employee handbook:

> This argument is based on the erroneous assumption that job opportunities are fungible and readily available. In contrast, I believe that rights secured by our Constitution and the Michigan Civil Rights Act should not rise or fall on an employee's ability to walk away from employment.

Heurtebise v. Reliable Bus. Computers, 550 N.W.2d 243 (Mich. 1996). As Justice Almon stated in his dissent to the majority's opinion in the case now before this Court, "If one employer is allowed to do this, is there anything to stop all employers from doing it and thereby depriving citizens of any opportunity to work without forfeiting constitutional rights?" Although persons may voluntarily relinquish constitutional rights, the type of agreement contained in United Healthcare's employee handbook, forced upon any person seeking employment, can hardly

be considered a knowing and voluntary relinquishment. Congress did not intend for the FAA to become a tool for forcing unwilling individuals into arbitration by the placement of carefully worded arbitration clauses which are completely void of bilateral promises into contracts of adhesion. To allow the FAA to be construed in the manner in which the Supreme Court of Alabama has, would allow for the FAA to take on a new meaning – one clearly not intended by either the plain language of the Act or the goals expressed by the members of Congress when drafting this legislation. The Supreme Court of Alabama has used the policy of liberally construing the Federal Arbitration Act so that all doubts are resolved in favor of arbitration to justify its decision in the present case. It is time for this Court to provide guidance and direction to the Supreme Court of Alabama and the other lower courts, so that future decisions regarding the FAA will not be based upon reliance on an undefined "policy in favor of arbitration", but will be based correctly upon interpretation of the Act itself and the intentions of Congress.

CONCLUSION

Cindy McNaughton has been forced into arbitration. Her employer has been allowed to bind her with a clause placed in a handbook offering no promises or contract upon which Cindy may rely. Now all persons seeking employment in the State of Alabama can be forced into relinquishing their rights to trial by jury, equal protection and due process of law merely because their need for employment forces them to sign an employee handbook

as a condition of employment. Although the Federal Arbitration Act was originally intended to allow merchants to enter into mutually agreeable contracts for arbitration, the Supreme Court of Alabama has gone beyond the plain language of the Act to extend its provisions to an arbitration clause which is not contained within any contract at all, but has been construed to be an employment contract. The decision by the Supreme Court of Alabama should be reversed as it is unsupported by the plain language of the FAA and violates the constitutional rights of all citizens of the State of Alabama.

Dated: June 3, 1999

Respectfully submitted,

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APPENDIX A
SUPREME COURT OF ALABAMA
SPECIAL TERM, 1998

1961708

Ex parte Cindy L. McNaughton

PETITION FOR WRIT OF MANDAMUS

(Re: Cindy L. McNaughton

v.

United Healthcare Services, Inc., et al.)

(Jefferson Circuit Court, CV-97-2058)

SEE, Justice.

Cindy L. McNaughton, the plaintiff in an action pending in the Jefferson Circuit Court, petitions for a writ of mandamus directing the circuit court to vacate its order compelling the arbitration of her claims against the defendant United Healthcare Services, Inc. ("United"). McNaughton maintains that arbitration is inappropriate because the arbitration clause contained in her employee handbook and relied on by the trial court is not part of a legally binding contract. In the alternative, McNaughton argues that the arbitration clause is void under the doctrine of unconscionability/mutuality of remedy. Because we hold that the arbitration clause was contained in a binding contract, and because we reject application of the doctrine of unconscionability/mutuality of remedy, we deny the petition.

I.

In July 1996, United hired McNaughton as an account service coordinator to work in United's Montgomery office. In accordance with a standard United employment policy, United issued McNaughton an employee handbook and required her to sign a form acknowledging that she had received it. As a condition of employment, United requires all employees to resolve employment claims against United through binding arbitration. Thus, each employee handbook contains an acknowledgement form that incorporates an arbitration agreement. As a condition of her employment, McNaughton signed one of these acknowledgement forms that incorporates United's arbitration policy.

In February 1997, McNaughton requested a transfer from the Montgomery office to United's Birmingham office. United subsequently interviewed her for a position in Birmingham. McNaughton alleges that after the interview process, United offered her a position in Birmingham, that she left her position with United in Montgomery, and that, relying on that offer, she relocated to Birmingham. However, United then notified McNaughton that it had hired another person for the Birmingham position. By that time, McNaughton's former position in the Montgomery office had also been filled.

In April 1997, McNaughton sued United in a two-count complaint claiming (1) fraud based on an alleged promise by United to transfer her from United's Montgomery office to its Birmingham office, and (2) claiming intentional interference with business relations. The trial court granted United's motion to stay the proceedings

and to compel arbitration. McNaughton filed this mandamus petition.

II.

A writ of mandamus is an extraordinary remedy that requires the showing of: (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty on the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court. *Ex parte Edgar,* 543 So. 2d 682, 684 (Ala. 1989). Although mandamus relief is rarely appropriate, it is available when a party demonstrates that he has been compelled to arbitrate a claim that he did not agree to arbitrate.[1] *Ex parte Beasley,* [Ms. 1961623, March 20, 1998] ___ So. 2d ___, ___ (Ala. 1998).

Section 2 of the Federal Arbitration Act ("FAA") provides:

> "A written provision in any . . . *contract* evidencing a transaction involving interstate commerce *to settle by arbitration* a *controversy* thereafter *arising out of such contract* or *transaction* . . . shall be valid, irrevocable, and enforceable. . . . "

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[1] A direct appeal is the generally accepted method for obtaining review of a trial court's order denying a motion to compel arbitration. *A.G. Edwards & Sons, Inc. v. Clark,* 558 So. 2d 358, 360 (Ala. 1990). A petition for a writ of mandamus is the generally accepted method for obtaining review of an order granting a motion to compel arbitration. *Ex parte Alexander,* 558 So. 2d 364, 365 (Ala. 1990).

9 U.S.C. § 2 (emphasis added).[2] Consistent with the FAA, trial courts are required to stay or dismiss proceedings and compel arbitration when the parties have entered into a valid contract containing an arbitration agreement. Moreover, the Supreme Court of the United States has stated that the FAA establishes a strong federal policy favoring arbitration:

> "The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). These principles provide the framework within which we must determine whether the trial court erred in requiring McNaughton to arbitrate the claims arising out of her employment.[3]

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[2] McNaughton does not contest that her employment involved interstate commerce. See *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995) (recognizing that the FAA is applicable to only those transactions involving interstate commerce).

[3] Although the matter is not raised by McNaughton, it is clear that the FAA's exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" does not apply to McNaughton's contract to arbitrate her employment claims. 9 U.S.C. § 1. The strong federal policy in favor of arbitration requires a narrow reading of the § 1 exemption. Thus, this Court has limited the § 1 exemption to seamen, railroad workers, and other workers actually involved in the interstate transportation of goods. *Robert Frank McAlpine Architecture, Inc. v. Heilpern,*

A. Binding Agreement to Arbitrate

McNaughton first argues that the acknowledgement form she signed when she accepted employment with United did not create a binding agreement to arbitrate her employment claims. The acknowledgment form contains the following pertinent language:

> **"At-Will Employment**
>
> *"I understand that the provisions in this Handbook are guidelines and, except for the provisions of the Employment Arbitration Policy, do not establish a contract* or any particular terms or condition of employment between myself and [United].
>
> "I understand that *the employment relationship is 'at will'* and is based upon the mutual consent. . . .
>
> **"Specific Acknowledgements**
>
> ". . . .
>
> **"Internal Dispute Resolution/Employment Arbitration Policy. . . .**
>
> "These policies provide the opportunity for prompt and objective review of employment concerns. I understand that arbitration is the

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[Ms. 1961928, March 22, 1998] ___ So. 2d ___ (Ala. 1998). Accord *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995); *Miller Brewing Co. v. Brewery Workers Local No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971).

> final, exclusive and required forum for the resolution of all employment related disputes which are based on a legal claim. *I agree to submit all employment related disputes* based on a legal claim *to arbitration* under [United's] policy."

(Emphasis added.)

McNaughton argues that, because of the "at-will" nature of her employment and because of the provision expressly stating that the policies contained in the employee handbook are not binding, this Court should not construe the arbitration policy incorporated into the acknowledgement form to be a binding agreement. We disagree.

When one party proposes a standard contract to another party, the parties may, of course, agree to be bound by certain of the clauses in the proposed contract and not to be bound by others. For example, in *Crown Pontiac, Inc. v. McCarrell*, 695 So. 2d 615, 618-20 (Ala. 1997), this Court held that an arbitration clause in a retail buyer's order was not binding because the buyer did not sign in the space provided under the arbitration clause, while he did sign in the spaces provided under other clauses of the retail buyer's order. Those clauses under which the buyer signed, indicating his agreement, were binding, but the clause under which the buyer did not sign, failing to indicate his agreement, was not binding. See *id.*

McNaughton's signed acknowledgement form indicates that the parties agreed to be bound by one provision of the employee handbook – the arbitration policy – but

not by other provisions of the handbook. Under *McCarrell*, 695 So. 2d at 618-20, the provision of the employee handbook to which McNaughton agreed to be bound – "I agree to submit all employment related disputes based on a legal claim to arbitration under [United's] policy" – is binding.[4] And the other provisions of the employee handbook to which McNaughton did not agree to be bound – "I understand that the provisions in this Handbook are guidelines and, except for the provisions of the Employment Arbitration Policy, do not establish a contract" – are not binding. *Id.* Given the clear precedent of *McCarrell*, to hold otherwise would treat arbitration clauses differently from other provisions of a contract, in contravention of the express holding of the Supreme Court of the United States. See *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions. . . . By enacting § 2 [of the Federal Arbitration Act] . . . , Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.' ") (citations omitted).

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[4] Ordinarily, in order to constitute a contract, an employee handbook must evidence a clear intention to bind the employer and the employee. Cf. *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725 (Ala. 1987). In this case, the strikingly clear language of the acknowledgement form signed by McNaughton – "I agree to submit all employment related disputes based on a legal claim to arbitration under [United's] policy" – evidences such an intent.

Further, under clear Alabama contract law, United's providing at-will employment to McNaughton constituted sufficient consideration in exchange for McNaughton's agreement to arbitrate her employment disputes under United's arbitration policy. This Court has consistently held that an employer's providing continued at-will employment is sufficient consideration to make an employee's promise to his employer binding. For example, in *Condelles v. Alabama Telecasters, Inc.*, 530 So. 2d 201, 204 (Ala. 1988), this Court stated that "continued [at-will] employment is sufficient consideration for signing a non-competition agreement." (Citing *Daughtry v. Capital Gas Co.*, 285 Ala. 89, 93, 229 So. 2d 480, 483 (1969).) Similarly, United's provision of new at-will employment to McNaughton was sufficient consideration to make McNaughton's promise to arbitrate employment disputes under United's arbitration policy a binding agreement.

These conclusions are supported by *Kelly v. UHC Management Co.*, 967 F. Supp. 1240 (N.D. Ala. 1997), in which the United States District Court for the Northern District of Alabama held that an acknowledgment form signed upon receipt of an employee handbook and that contained language identical to the language of the acknowledgment form signed by McNaughton created a binding contract to arbitrate employment disputes. Just as with the acknowledgment form signed by McNaughton, the acknowledgement form signed in *Kelly*, 967 F. Supp. at 1243, provided that "the provisions in this Handbook are guidelines and, except for the provisions of the Employment Arbitration Policy, do not establish a contract." Just as with the acknowledgment form signed by McNaughton, the acknowledgement form signed in

Kelly, id., provided: "I agree to submit all employment related disputes based on a legal claim to arbitration. . . . " Just as with McNaughton's promise to arbitrate under United's arbitration policy, the employees' promises in *Kelly, id.* at 1260, to arbitrate under the employer's arbitration policy was supported by the consideration of at-will employment. The district court in *Kelly* held that the acknowledgment form signed by the employees created a binding agreement to arbitrate their claims against the employer. *Id.* at 1260. Accord *Beasley,* ___ So. 2d at ___ (stating that if an employee signs an acknowledgment form containing a binding arbitration clause, the employee will be required to arbitrate his claims) (citing *O'Neil v. Hilton Head Hospital,* 115 F.3d 272, 273 (4th Cir. 1997), and *Patterson v. Tenet Healthcare, Inc.,* 113 F.3d 832 (8th Cir. 1997)). Accordingly, we hold that the acknowledgment form signed by McNaughton created a binding agreement to arbitrate her claims against United.

B. Unconscionability/Mutuality of Remedy

McNaughton contends that even if the language in the acknowledgment form creates a binding agreement to arbitrate, the contract is void under the doctrine of unconscionability/mutuality of remedy. United's arbitration policy allows United to choose arbitration or another forum, but does not afford the employee the same choice of forum:

> "The Policy does not require that [United] initiate the arbitration process in regard to any dispute. In addition [United] is not required to follow the steps of either [the Internal Dispute Resolution process] or the [Arbitration] Policy

> before initiating or implementing any disciplinary action, or before asserting any claim, demand or action against an employee for breach of any restrictive covenant, wrongful disclosure of confidential information, or any other actions which may constitute a breach of contract, a breach of [United's] Code of Conduct, a breach of a common law duty, or a breach or violation of either civil or criminal law.
>
> ". . . .
>
> "[United] reserves the right to alter, amend, modify, or revoke this policy at its sole and absolute discretion at any time with or without notice. Any alteration, amendment, modification, or revocation may be done only in writing, signed by the Senior Executive, Human Resources."

In support of her argument that the language quoted above voids her agreement to arbitrate, under the doctrine of unconscionability/mutuality of remedy,[5]

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[5] In his dissent, Justice Cook asserts that the single contract between United and McNaughton is really two contracts: (1) a nonarbitration contract to which all the consideration is allocable; and (2) an arbitration agreement to which none of the consideration is allocable. ___ So. 2d at ___ (Cook, J., dissenting). He then concludes that the arbitration agreement is not binding, because it is supported only by promises that United can "alter, amend, modify, or revoke" and, thus, is not supported by sufficient consideration. *Id.* at ___. This assertion fails, for three reasons. First, there is only one contract. United and McNaughton expressly agreed that the provisions of the employee handbook, "except for the provisions of the Employment Arbitration Policy, do not establish a contract." See *Lilley v. Gonzales*, 417 So. 2d 161, 163 (Ala. 1982) ("Where . . . the language of the contract is unambiguous and plain in its

McNaughton relies heavily on *Northcom, Ltd. v. James*, 694

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expression, the court cannot alter the agreement by construction but rather must expound it as made by the parties."). Thus, the only contract that the parties themselves, by their own writing, agreed to is the arbitration policy contained in the employee handbook.

Second, the single contract – the arbitration agreement – is supported by sufficient consideration. McNaughton agreed to arbitrate pursuant to the arbitration policy, which United reserved the right to amend. In return, United provided at-will employment to McNaughton. United's provision of at-will employment was sufficient consideration to support McNaughton's promise to arbitrate her employment-related disputes. In *Condelles v. Alabama Telecasters, Inc.*, 530 So. 2d 201, 204 (Ala. 1988), this Court rejected the argument that an employer's providing at-will employment is not sufficient consideration to support an employment-related promise by the employee:

> "[The employee] also argues that he was paid no consideration for signing the noncompetition agreement. We note that our case law holds that continued employment is sufficient consideration for signing a noncompetition agreement."

Similarly, we reject the argument that United's providing at-will employment is not sufficient consideration to support the employment-related promise to arbitrate by McNaughton.

Third, United's promises in the arbitration policy, which it reserved the right to "alter, amend, modify, or revoke," do not deprive the contract of consideration. Of course, these revocable promises by themselves would not constitute sufficient consideration to support a contract to arbitrate. See 3 Richard A. Lord, *Williston on Contracts* § 7:7, p. 89 (4th ed. 1992) ("[W]here the promisor may perform or not, solely on the condition of his whim, his promise will not serve as consideration."). However, providing at-will employment is sufficient consideration. *Condelles*, 530 So. 2d at 204. At bottom, United gave

So. 2d 1329, 1338 (Ala. 1997), where two Justices on this Court stated in dictum:

> "[I]n a case involving a contract of adhesion, if it is not shown that the party in an inferior bargaining position had a meaningful choice of agreeing to arbitration or not, and if the superior party has reserved to itself the choice of arbitration or litigation, a court may deny the superior party's motion to compel arbitration based on the doctrines of mutuality of remedy and unconscionability."

Upon further consideration, we reject this dictum from *Northcom*, merging the distinct doctrines of unconscionability and mutuality of remedy to strike down arbitration clauses. Arbitration is not inherently unconscionable, nor is it a remedy. When interpreting the FAA, the federal courts have concluded that, consistent with the federal policy strongly favoring arbitration, *Moses H. Cone Mem'l Hospital*, 460 U.S. at 24-25, "there is nothing inherently unfair or oppressive about arbitration

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McNaughton a job, and McNaughton in return agreed, as a condition of her employment, to arbitrate employment-related disputes pursuant to the arbitration policy as amended by United from time to time. Thus, there was sufficient consideration to bind McNaughton to arbitrate her employment-related claims. See *Kelly v. UHC Management Co.*, 967 F. Supp. 1240, 1258-60 (N.D. Ala. 1997) (holding that an employer's reservation of right to "alter, amend or revoke the arbitration policy" in an employee handbook did not invalidate the binding agreement to arbitrate employment disputes); *Maye v. Smith Barney Inc.*, 897 F. Supp. 100, 103 (S.D.N.Y. 1995) (holding that an employee was required to arbitrate employment disputes under arbitration policies that the employer reserved the right "to publish from time to time").

clauses." *Coleman v. Prudential Bache Securities, Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986). Accord *Kelly*, 967 F. Supp. at 1257 (" '[T]here is nothing inherently unfair or oppressive about arbitration clauses.' . . . [N]othing about the present agreement is unconscionable or overbearing.") (citation omitted). Moreover, the Supreme Court has stated: "Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991). Instead of suffering unconscionable treatment, a party, "by agreeing to arbitrate, . . . 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.' " *Gilmer*, 500 U.S. at 31 (citations omitted). Thus, agreements to arbitrate are not in themselves unconscionable.[6]

Further, properly understood, the concept of mutuality of remedy has no application to arbitration agreements. In *General Securities Corp. v. Welton*, 223 Ala. 299, 306, 135 So. 329, 335 (1931), this Court explained the concept of mutuality of remedy:

> " ' "Equity will not compel specific performance by a defendant, if after performance the common-law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract." . . . "The court will not grant specific performance to plaintiff and at the same time leave defendant to the legal remedy of damages for possible future breaches on plaintiff's part." This rule, it is believed, covers

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[6] McNaughton does not allege that the arbitration agreement is for any other reason unconscionable.

> the circumstances in equity where, according to the weight of authority, the court refuses its aid for lack of mutuality.' "

(Citations omitted.) "However, the law does not require that the parties have similar remedies in case of breach, and the fact that specific performance or an injunction is not available to one party is not a sufficient reason for refusing it to the other party." *Restatement (Second) of Contracts*, § 363 cmt. c (1981).

The doctrine of mutuality of remedy is limited to the availability of the ultimate redress for a wrong suffered by a plaintiff, not the means by which that ultimate redress is sought. A plaintiff does not seek as his ultimate redress an arbitration proceeding or a court proceeding. Instead, he seeks legal relief (e.g., damages) or equitable relief (e.g., specific performance) for his injury, and he uses the proceeding as a means to obtain that result. See *Goodwin v. Ford Motor Credit Co.*, 970 F. Supp. 1007, 1014 (M.D. Ala. 1997) ("[A]rbitration is not a remedy, but a choice-of-forum in which to seek remedies (just as a jury trial is no more or less a remedy than a bench trial). . . . "). Thus, an arbitration proceeding is not a remedy.

Accordingly, in *Goodwin*, 970 F. Supp. at 1012, the United States District Court for the Middle District of Alabama stated:

> "[*Northcom*] . . . introduces a rather novel, if not revolutionary, doctrine of contract law. In its strong version, it holds that each party to an arbitration agreement must be able to compel the other to arbitrate disputes whenever it would be most advantageous to themselves to do so, or the agreement will not be enforced. At

> the very least, it holds that both sides may have to have symmetrical remedies in an adhesion contract, or it may be found unconscionable. The weight of precedent and scholarship . . . generate too much ballast for this doctrine to be able to lift off. . . . "

Accord *Rollins, Inc. v. Foster,* 991 F. Supp. 1426 (M.D. Ala. 1998) (reiterating that it would not accept the doctrine of unconscionability/mutuality of remedy referred to in *Northcom*).

Although the doctrine of unconscionability/mutuality of remedy purportedly could apply in the nonarbitration context, as suggested in the main opinion in *Northcom,* it directly depends on arbitration for its application: "The element of unconscionability in the context of an arbitration clause is supplied by the fact that, by agreeing to arbitrate, a party waives his right to 'a remedy by due process of law' . . . and his 'right of trial by jury'. . . . " *Northcom,* 694 So. 2d at 1338-39 (citations omitted). See *Goodwin,* 970 F. Supp. at 1014 ("[W]hile paying lip-service to the notion that [the doctrine of unconscionability/mutuality of remedy] 'is equally true as to any unconscionable term of a contract of adhesion,' . . . the [lead opinion in *Northcom*] relies on the uniqueness of the concept of arbitration under Alabama law to support the [doctrine]."). At bottom, this approach assigns a suspect status to arbitration agreements. Doing so flies in the face of *Doctor's Associates,* 517 U.S. at 687, where the Supreme Court of the United States explicitly stated that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions." (Emphasis omitted.) Accordingly, we

expressly reject the *Northcom* dictum regarding the doctrine of unconscionability/mutuality of remedy.[7]

McNaughton entered into a legally binding agreement with United to arbitrate her claims. Because we reject the *Northcom* dictum, the arbitration agreement is not void on the basis of the doctrine of unconscionability/mutuality of remedy. Thus, McNaughton has not demonstrated that the trial court erred in ordering the arbitration of her claims.

WRIT DENIED.

Hooper, C.J., and Maddox and Houston, JJ., concur.

Lyons, J., concurs specially.

Almon, Shores, Kennedy, and Cook, JJ., dissent.

LYONS, Justice (concurring specially).

I write specially to state that I join in the main opinion without reservation. Upon reading Justice Almon's moving dissent, I am compelled to observe that I can detect no sense of glee or smug satisfaction on the part of any member of the majority in the difficult task of applying the Federal Arbitration Act to cases pending in

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[7] We note that McNaughton also cites *Hull v. Norcom, Inc.*, 750 F.2d 1547 (11th Cir. 1985), for the proposition that the arbitration agreement is not binding under the doctrine of "mutuality of obligation." On rehearing in *Northcom, Ltd. v. James*, 694 So. 2d 1329, 1336 (Ala. 1997), this Court rejected the use of that doctrine to strike down an arbitration clause. Accord *Randolph v. Green Tree Financial Corp.*, 991 F. Supp. 1410, 1421-22 (M.D. Ala. 1997) (rejecting the "mutuality of obligation" argument, and noting that *Hull* was based on New York case law that was subsequently overruled).

the courts of this state. I hasten to add that I do not read in the dissent any insinuation that the majority relishes the task of implementing the Federal Arbitration Act, but I wish to eliminate any doubt.

In his dissent, Justice Almon invokes the Ninth and Tenth Amendments to the United States Constitution as he passionately protests what he sees as injury to fundamental rights resulting from the application of the Federal Arbitration Act. I am reminded of the spirit in which I wrote a concurring opinion in *Ex parte Dan Tucker Auto Sales, Inc.*, [Ms. 1951866, July 2, 1998] ___ So. 2d ___ (Ala. 1998), where I expressed an apparently divergent view as to the availability of the Tenth Amendment in the context of federal power derived from the Commerce Clause (Art. I, § 8), further discussed what I see as mixed signals in this area from the Alabama Constitution of 1901, and offered what I consider to be a defensible role for the doctrine of unconscionability. I do not believe this case presents such facts as would be essential for a finding of unconscionability.

ALMON, Justice (dissenting).

I respectfully dissent. I continue in the views I expressed in *Northcom, Ltd. v. James*, 694 So. 2d 1329, 1338 (Ala. 1997):

> "[I]n a case involving a contract of adhesion, if it is not shown that the party in an inferior bargaining position had a meaningful choice of agreeing to arbitration or not, and if the superior party has reserved to itself the choice of arbitration or litigation, a court may deny the superior party's motion to compel arbitration

based on the doctrines of mutuality of remedy and unconscionability."

The employee handbook at issue here gives no rights to the employee and imposes no obligations on the employer, but it conditions continued employment on a requirement that the employee waive his or her constitutional rights to trial by jury, U.S. Const. Amend. VII;[8] Ala. Const. 1901, Art. I, § 11,[9] and to access to a judicial tribunal for a remedy by due process of law, U.S. Const.

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[8] The Seventh Amendment to the Constitution of the United States provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

[9] Section 11 of the Alabama Constitution of 1901, together with the preamble to Article I, the Declaration of Rights, provides: "That the great, general, and essential principles of liberty and free government may be recognized and established, we declare: . . . That the right of trial by jury shall remain inviolate." The right of trial by jury has been guaranteed in these words in all of the Constitutions of Alabama – in 1819, as Art. I, § 28; in 1861, as Art. I, § 28; in 1865, as Art. I, § 12; in 1868, as Art. I, § 13; in 1875, as Art. I, § 12.

Amends. V and XIV;[10] Ala. Const. 1901, Art. I, §§ 10 and 13.[11]

A contract of adhesion is one that is offered on a "take it or leave it" basis to a consumer who has no meaningful choice in the acquisition of goods or services. *Northcom*, at 1337. I would hold this definition applicable to employees as well as consumers, at least as to certain terms of employment, such as one that attempts to force an employee to surrender constitutional rights. I think this attempt by United Healthcare Services, Inc., to impose arbitration on its employees fits the definition of a contract of adhesion – assuming, as I do not, that any contract is created by the handbook at all.

I also think it would be unconscionable to enforce the arbitration clause in this employee handbook. United gives its employee no right or benefit for his or her

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[10] The Fifth Amendment to the Constitution of the United States, provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment provides, in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[11] Section 10 of the Alabama Constitution of 1901 provides: "That no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party." Section 13 provides: "That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay."

"agreement" to submit any claims or disputes to arbitration. United reserves to itself the absolute right to amend or repeal any provision of its handbook, including the arbitration clause. Thus, it can litigate any claims it has against its employee, so that, as Justice Cook says, any purported promise it has made to arbitrate its claims is simply illusory.

The discussion in *Northcom* regarding mutuality of remedy presents a perspective from which it can be seen that, because of equitable principles applicable to all contracts, a court should not grant a motion that, in essence, seeks specific performance of an arbitration clause in a contract, where the movant would not be subject to such a remedy. If a superior party, such as an employer, can invoke specific performance of an arbitration clause in a contract of adhesion, but the inferior party, such as an employee, cannot, there is such a lack of mutuality that a court should not grant the equitable remedy of specific performance of that term of the contract. In short, it would be inequitable and, under the circumstances, unconscionable, to deprive someone of their constitutional rights to access to a court and to a jury for resolution of their claims against the party that has sought to deprive them of those rights.

Before its recent discovery of a federal policy favoring arbitration,[12] the Supreme Court aptly expressed concern:

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[12] That policy was first announced in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). See Sternlight, *Rethinking the Constitutionality, infra*, 72 Tulane L. Rev. at 17-18.

> "[T]he remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and by Ch. 1, Art. 12th, of the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial – all as discussed in *Wilko v. Swan*, 346 U.S. 427, 435-438 [(1953)]."

Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 203 (1956).

The Federal Arbitration Act was originally adopted by Congress to allow merchants, wholesalers, shippers, and other sophisticated parties engaged in commercial and business activities to agree among themselves, in bargained-for contracts, to submit to binding arbitration any disputes that might arise out of their activities in interstate or maritime commerce. See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U.L.Q. 637, 647 (1996), and Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 Tulane L. Rev. 1 (1997). The Supreme Court of the United States has

expanded the application of that Act to contracts between retailers and consumers, see, e.g., *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995). In *Gilmer v. Interstate/Johnson Lane Co.*, 500 U.S. 20, 25 n.2 (1991), it also acknowledged, without reaching the question, that the federal appellate courts have held that the FAA applies to employment contracts, in spite of the express language of 9 U.S.C. § 1 that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *See Tenney Engineering, Inc. v. United Elect. Radio & Mach. Workers of America*, 207 F.2d 450 (3d Cir. 1953), and cases following. It seems contradictory to say that a contract of employment "involv[es] commerce," 9 U.S.C. § 2, for the sake of applying the FAA, and then to say that the worker is not "engaged in . . . interstate commerce," 9 U.S.C. § 1, for the sake of refusing to apply the exception to the FAA.

The United States Supreme Court has, however, recognized that under the FAA, 9 U.S.C. § 2, an arbitration provision is "valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" (Emphasis added.) See, e.g., *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). The refusal to enforce a purported contract that is one of adhesion and that preserves to the superior party who drafted the contract the right of access to a court and the right to a jury while depriving the inferior party of those rights is certainly a ground that exists in equity for revoking such a contract.

It seems that the majority's decision will allow employers to present their employees with a document

that says, in effect, "If you want to continue working for me, you have to give up your right to take me to court and to have a jury trial to obtain redress for an injury I may cause you to suffer." Does this apply to workers' compensation claims? If one employer is allowed to do this, is there anything to stop all employers from doing it and thereby depriving citizens of any opportunity to work without forfeiting their constitutional rights?

I cannot see how the United States Supreme Court, which exists pursuant to the United States Constitution, can apply an Act of Congress so as to undermine the right of trial by jury in the states that guarantee that right in their state constitutions. The United States Constitution guarantees the right of trial by jury in the Seventh Amendment. That Amendment was adopted within the Bill of Rights as a limitation on the Federal Government. Furthermore, the Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." If there is any conflict between the Commerce Clause, Art. I, § 8, cl. 3, U.S. Const., and the Bill of Rights, the latter clearly should prevail, because its adoption as a limitation on federal power was crucial to the ratification of the Constitution.

How can the Supreme Court, ignoring the Seventh and Tenth Amendments and state constitutional guarantees of the right of trial by jury, construe an Act of Congress beyond its original intent in such a way as to prevent citizens of the United States and the states from exercising their constitutional right to litigate in court?

Neither the Supreme Court nor the Congress has that constitutional authority.

Significant questions in these respects have never been addressed regarding an application of the FAA that deprives individuals of the right of trial by jury based upon a fanciful notion that the individual has "voluntarily" waived that right. I acknowledge the proper application of the Supremacy Clause, U.S. Const. Art. VI, cl. 2,[13] but I am reluctant to concede that the United States Supreme Court has the authority to adopt a construction of an Act of Congress that does the following things: (1) Under the auspices of the Commerce Clause, the Act is construed to undermine the rights of the citizens of the several states to a trial by jury as guaranteed under their state constitutions and under the founding principles of this country.[14] (2) A notion of waiver of constitutional

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[13] The Supremacy Clause reads: "This Constitution, and the laws of the United States which shall be made *in pursuance thereof;* and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding." (Emphasis added.) Of course, if the Federal Arbitration Act conflicts with the Constitution of the United States, it is not "the supreme law of the land."

[14] The Supreme Court has not, at any time since it began applying the doctrine of selective incorporation of the Bill of Rights into the Fourteenth Amendment, squarely addressed the question whether the Seventh Amendment applies to the states. Even absent the application of the Seventh Amendment directly to the states, its presence in the Bill of Rights is certainly a limitation on the power of the Congress and the Supreme Court of the United States.

rights is adopted that runs directly counter to the jurisprudence regarding waiver of constitutional rights in all other areas, especially criminal law. (3) The "republican form of government" that Article IV, § 4, of the United States Constitution commands the United States to "guarantee to every state" is seriously undermined by a wholesale removal from the state courts of jurisdiction to resolve disputes. (4) Liberty is curtailed, despite the fact that, as expressed in the Preamble to the United States Constitution "We, the People of the United States, in order to . . . secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

The United States Supreme Court has not addressed the application of the Seventh Amendment to the FAA. Even if the Seventh Amendment does not protect a litigant's right of trial by jury in a state court, surely that right is protected by the Tenth Amendment, quoted above, and the Ninth Amendment, which reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." King George's denial of the right of trial by jury was one of the articles of the Declaration of Independence:

> "[The King of Great Britain] has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation:
>
> ". . . .
>
> "For depriving us, in many Cases, of the Benefits of Trial by Jury."

If a state guarantees its citizens the right of trial by jury in civil cases, the power of Congress to regulate commerce should not be taken to supersede all the constitutional protections of the rights of access to court, to due process of law, and to trial by jury. These points seem so fundamental and so obvious to me that I am amazed that they have not heretofore been raised and addressed in the recent flurry of litigation over the Federal Arbitration Act.

I note these thoughts in passing, with the hope that they may be fully addressed before the jurisprudence under the Federal Arbitration Act finally deprives us of the ordered liberty guaranteed by our constitutional system of government. This decision by the majority concerns me. I hope that the citizens of Alabama and the United States are not harmed as badly as it seems to me they will be. Someone should patch our Liberty Bell and ring it again for all to hear!

COOK, Justice (dissenting).

The majority concludes that Cindy McNaughton, an at-will employee of United Healthcare Services, Inc. ("United"), must arbitrate her claims of fraud and interference with business relations against United, based on arbitration provisions contained in the "Arbitration Policy" section of United's "United Healthcare Corporation Employee Handbook" (the "Handbook"), and more fully set forth in the "United Healthcare Corporation Employment Arbitration Policy" ("the UHCEAP"). In other words, it holds that the arbitration provisions constitute a binding contract between United and McNaughton.

Because I consider the arbitration provisions unenforceable under ordinary rules of contract law, I respectfully dissent.

Perhaps it bears repeating here "that the enforceability of arbitration agreements is governed by the rules applicable to contracts generally." *Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 136, 535 N.E.2d 643, 645, 538 N.Y.S.2d 513, 515 (1989); see also *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements"). Thus, the Federal Arbitration Act, 9 U.S.C. § 1 et seq., is designed to place arbitration agreements " 'upon the *same footing* as other contracts,' " *Casarotto*, 517 U.S. at 687 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)) (emphasis added), not to *elevate them above* other contracts. That, in essence, is what the majority has done in this case.

"The at-will employment relationship, despite its limitations, is nonetheless *contractual*. Employment contracts, particularly those which would be considered at-will, are the best and most typical examples of *unilateral contracts*." *Wagner v. City of Globe*, 150 Ariz. 82, 85, 722 P.2d 250, 253 (1986) (emphasis added). In a unilateral contract, "the offer or promise of one party does not become binding or enforceable until there is performance by the other party." *Scholtes v. Signal Delivery Serv., Inc.*, 548 F. Supp. 487, 491 (W.D. Ark. 1982). "Ordinarily, in a unilateral contract, there is no bargaining process or exchange of promises. . . . Only one party makes an offer (or promise) which invites performance by another, and the *performance* constitutes both the acceptance of that

offer and consideration." *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712, 719 n. 11 (Ind. 1997) (emphasis added). In such cases, the employer induces the employee to render services to receive payment for performance, which is, itself, consideration for the promise. The employer's promise ripens into an enforceable contract upon performance by the employee.

In certain cases, as we recognized in *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725 (Ala. 1987), terms in an employee handbook can modify the employer's promise in some sense, such as qualifying the employer's unfettered right to terminate employment. But elements added by a handbook do not change the fundamental, unilateral character of the at-will contractual relationship. See Note, *Employee Handbooks and Employment-At-Will Contracts*, 1985 Duke L.J. 196, 212-14. Still, the parties bargain not for promises, but for performance. See *id.*

But there is another class of contracts, where the parties contemplate or bargain not for performance, but for *promises*. Such a contract is *bilateral* and *executory* – the *promises* constituting the necessary consideration. " 'In a bilateral contract, the promise of each promisor must be bargained for and given in exchange for the other's promise.' " *NBZ, Inc. v. Pilarski*, 185 Wis. 2d 827, 838 n.5, 520 N.W.2d 93, 97 n.5 (Ct. App. 1994).

In this class of contracts, if the promise on one side is only *illusory*, there is no "mutuality of obligation" and the contract is unenforceable. "Because the promises of both parties to a bilateral contract must be supported by consideration, the contract is unenforceable if the promise of either party is illusory (Calamari & Perillo, Contracts

§ 70, at 134)." *Curtis Properties Corp. v. Greif Companies*, 212 A.D.2d 259, 265, 628 N.Y.S.2d 628, 632 (1995). "When illusory promises are all that support a purported bilateral contract, there is no contract." *Light v. Centel Cellular Co. of Texas*, 883 S.W.2d 642, 645 (Tex. 1994). A promise is illusory when the promisor "promises to do a thing only if it pleases him to do it." *Winslow v. Mell*, 48 Wash. 2d 581, 584, 295 P.2d 319, 321 (1956). Otherwise stated:

> "[W]hile a promise may constitute sufficient consideration for a return promise even though the promisor retains a *limited* discretion as to his performance, it is not sufficient if his performance depends *solely upon his option* or discretion, as where the promisor is free to perform or to withdraw from the agreement at will."

First Wisconsin Nat'l Bank of Milwaukee v. Oby, 52 Wis. 2d 1, 7, 188 N.W.2d 454, 457 (1971) (emphasis added).

The majority misunderstands the facts in this case and misapplies the law. More specifically, it fails to realize that this case involves *two, distinct* contracts. One contract is the *standard* unilateral, at-will employment contract. That fact is evidenced by a provision in the "Code of Conduct and Employee Handbook Acknowledgment" ("Code") signed by McNaughton. The Code states:

> **"At-Will Employment**
>
> "I understand that the provisions in this Handbook are guidelines and, *except for the provisions of the Employment Arbitration Policy, do not establish a contract* or any particular terms or condition of employment between myself and UHC."

(Emphasis added.) Indeed, it is undisputed that the employment relationship was an at-will relationship.

But "at-will employment does *not* preclude the formation of other contracts between employer and employee." *Light*, 883 S.W.2d at 644 (emphasis in original). If the consideration for such contracts is not the performance of services, but, instead, mutual promises, then the contracts are bilateral and – provided the promises are not illusory – are enforceable *independently* of unilateral, at-will contracts existing between the parties. The majority fails to recognize (1) that the UHCEAP is an executory, bilateral contract and (2) that the promises of United are illusory. More specifically, it errs in characterizing the UHCEAP as a unilateral relationship thus confusing it with the at-will contract that existed independently of the UHCEAP.

In fact, in addition to the *promises of McNaughton*, the UHCEAP – which encompasses 7½ pages of text – contains a *number* of *promises by United*. For example, United promises: (1) to "pay 100 percent in excess of the first twenty-five dollars . . . of the required AAA administrative fee," UHCEAP, Rule C., § 1, ¶ 1; (2) to pay the expenses of its own witnesses, *id.* at § 25; (3) to pay its "own legal fees and expenses," *id.*; and (4) to pay "[a]ll other expenses . . . of the arbitration, such as required travel and other expenses of the arbitrator." *Id.* Clearly, the UHCEAP contains promises running from *both* parties.

Moreover, the UHCEAP purports to be applicable to United's employment relationships whether its employees ever actually perform services for United. Specifically, it states in pertinent part:

> "B. SCOPE OF POLICY
>
> "Arbitration is the final, exclusive and required forum for the resolution of all *employment related* disputes which are based on a legal claim. . . .
>
> "A dispute is based on a legal claim and is subject to this Policy if it *arises or involves a claim* under any federal, state or local statute, regulation or common law doctrine *regarding or relating to . . . terms and conditions of employment. . . .*"

(Emphasis added.)

The scope of the arbitration provisions is so broad that it is entirely conceivable a dispute could arise, triggering the UHCEAP, *before an employee actually begins work.* In the absence of such performance, the consideration necessary to render a unilateral, at-will contract enforceable would be lacking. The UHCEAP, however, being a bilateral contract, does not stand or fall on performance, but on the mutual promises of the parties. Thus, except for the fact that the promises of United are *illusory,* the UHCEAP purports to have been enforceable had McNaughton not worked a single day.

The fatal flaw of the UHCEAP, rendering it illusory, is contained in the following provision: "United Healthcare reserves the right to alter, amend, modify, or revoke this policy at *its sole and absolute discretion at any time with or without notice.*" (Emphasis added.) As I have already

discussed in this opinion, a promise is illusory, rendering the "contract" unenforceable, "if [the promisor's] performance depends *solely upon his option* or discretion, as where the promisor is free to perform or to withdraw from the agreement at will." *First Wisconsin Nat'l Bank of Milwaukee v. Oby*, 52 Wis. 2d 1, 7, 188 N.W.2d 454, 457 (1971) (emphasis added). The "promises" of United in the UHCEAP provide the classic example of this rule, because it can perform, or not perform, at its "sole and absolute discretion."

The majority attempts to evade the application of this rule through its discussion of covenants not to compete, as though the two rules were analogous. They are not. The rule of noncompetition agreements, as it has evolved in this state, bases its validity on *performance*. See *Condelles v. Alabama Telecasters, Inc.*, 530 So. 2d 201, 204 (Ala. 1988) ("our case law holds that continued employment is sufficient consideration for signing a noncompetition agreement"). Under this rationale, the noncompetition agreement is still regarded as a class of *unilateral* contract. See Note, *Consideration for Employee Noncompetition Covenants in Employments at Will*, 54 Fordham L. Rev. 1123, 1138-39 (1986). Although such agreements do, like bilateral contracts, involve two promises – that of the employer to pay for performance and that of the employee not to compete – actually, the basis of the bargain is not a promise for a promise as in a bilateral contract. Instead, the employee bargains not for a promise, but for employment, that is, payment for services rendered. "The covenant becomes enforceable against the employee only after the employer has accepted the employee's offer by beginning or completing the

requested performance." *Id.* at 1139. "The requested performance may include continuing the employment, paying the employee a flat stated sum or giving the employee some other immediate benefit." *Id.*

Thus, noncompetition agreements are distinguished from the bilateral contract in this case by the fact that the at-will contract itself is the essence of the former, but not of the latter. In this case, the consideration on which enforceability depends is the mutual promises, which, on United's side, are illusory. Based on ordinary principles of contract law, therefore, the arbitration agreement in this case is unenforceable.

The majority cites *Kelly v. UHC Management Co.*, 967 F. Supp. 1240 (N.D. Ala. 1997), as support for its position on this point. To be sure, that case is factually indistinguishable from this case. Unfortunately, the court in *Kelly* made the same error the majority makes in this case, namely, the failure to discern that this scenario involves an executory, bilateral contract requiring *mutual promises* of *substance* as consideration. For these reasons, I respectfully dissent.

Shores, J., concurs.

APPENDIX B

IN THE SUPREME COURT OF ALABAMA
March 5, 1999

1961708

Ex parte Cindy L. McNaughton PETITION FOR WRIT OF MANDAMUS (In re: Cindy L. McNaughton v. United Healthcare Services, Inc., et al.) (Jefferson Cir. Ct. No.: CV-97-2058)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

SEE, J. – Hooper, C.J., and Maddox, Houston, Lyons, and Brown, JJ., concur; Kennedy, and Cook, JJ., dissent.

APPENDIX C

PLAINTIFF'S EXHIBIT

D

CINDY L. MCNAUGHTON PLAINTIFF VS. UNITED HEALTHCARE SERVICES, INC., a corporation, et al DEFENDANTS	CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA CASE NO. CV 97-2058 JDC

ORDER GRANTING MOTION TO STAY

(Filed Jun. 13, 1997)

This cause came on to be heard upon the "Defendants' Motion To Stay Further Proceedings Pursuant To The Federal Arbitration Act" filed by United HealthCare Corporation and Tony Derico on April 22, 1997, and after hearing statements and arguments of counsel, the Court finds and hereby ORDERS, ADJUDGES and DECREES that the said motion is granted and Plaintiff is hereby directed to either begin arbitration proceedings or mandamus proceedings within 30 days.

DONE and ORDERED this 13th day of June, 1997.

/s/ Jack D. Carl
CIRCUIT JUDGE

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Supreme Court, U.S.
FILED
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No. 98-1941

In The

Supreme Court of the United States

CINDY L. MCNAUGHTON,

Petitioner,

vs.

UNITED HEALTHCARE SERVICES, INC., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Should this Court grant certiorari to determine the scope of § 1's exclusion of certain individual employment contracts from the Federal Arbitration Act, or whether there has been any deprivation of federal constitutional rights, when Petitioner never presented these issues to the Circuit Court of Jefferson County, Alabama or the Alabama Supreme Court?

II. Should this Court grant certiorari to determine the scope of § 1's exclusion of certain individual employment contracts from the Federal Arbitration Act, in the absence of conflict among the United States Courts of Appeals?

III. Should this Court grant certiorari to determine whether the Alabama Supreme Court correctly determined the validity of a contract under Alabama law?

IV. Does the specific arbitration agreement at issue violate Petitioner's rights to equal protection, due process and trial by jury?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The Petition accurately lists the parties to the proceeding.

United HealthCare Corporation is the parent company of United HealthCare Services, Inc. United HealthCare Services, Inc. has two nonwholly owned subsidiaries: (1) United HealthCare of Virginia, Inc. and (2) United HealthCare of Kentucky, Ltd.

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BRIEF IN OPPOSITION

Respondents United HealthCare Services, Inc. ("United HealthCare") and Tony Derico ("Derico") (collectively "United"), respectfully request that this Court deny Cindy L. McNaughton's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On April 7, 1997, Petitioner sued United HealthCare, her former employer, and Derico, her former supervisor at United HealthCare, in the Circuit Court of Jefferson County, Alabama (the "Circuit Court"), alleging fraud and intentional interference with business relations. On April 22, 1997, United moved the Circuit Court to stay the action pursuant to § 3 of the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 3. Petitioner filed a Memorandum opposing United's motion on May 22, 1997. The Memorandum requested the Circuit Court not to stay the action because (1) "the arbitration clause is not part of a contract," App. 11, and (2) "the arbitration clause is not mutually binding," App. 14. In her Memorandum, Petitioner neither raised any issue regarding the scope of § 1's exclusion of individual employment contracts from the FAA, nor did she raise any issue regarding any alleged violation of her constitutional rights to a jury trial or due process. App. 8-17.

On June 13, 1997, the Circuit Court granted United's motion to stay. Pet. App. 35. On July 15, 1997, McNaughton petitioned the Alabama Supreme Court for a Writ of Mandamus. In her Petition for Writ of Mandamus and Reply Brief in Support of Petition for Writ of

Mandamus, like her Circuit Court Memorandum, she challenged the Circuit Court's Order only on two specific state law grounds: (1) "the arbitration clause is not part of a contract," App. 1 & 32, and (2) "the arbitration clause is not mutually binding," App. 4 & 35. In her Petition for Writ of Mandamus and Reply Brief in Support of Petition for Writ of Mandamus, as in her Circuit Court Memorandum, Petitioner neither raised any issue regarding the scope of § 1's exclusion of individual employment contracts from the FAA, nor raised any issue regarding any alleged violation of her constitutional rights to a jury trial or due process. App. 1-6 & 27-41.

On August 28, 1998, in *Ex parte McNaughton*, 728 So. 2d 592 (Ala. 1998), the Alabama Supreme Court denied McNaughton's Petition for Writ of Mandamus. Pet. App. 16. It held that the arbitration agreement was a valid contract under Alabama state law, and that the arbitration agreement was not void under the state law doctrine of unconscionability/mutuality of remedy. Moreover, the Alabama Supreme Court expressly noted that Petitioner never raised the issue of the scope of § 1's exclusion of individual employment contracts. Pet. App. 4 n.3. It denied Petitioner's application for rehearing, without opinion, on March 5, 1999. Pet. App. 34. To date, Petitioner has not sought to arbitrate any of her claims.

STATEMENT OF FACTS

On July 29, 1996, United HealthCare hired Petitioner as an Account Service Coordinator in its Montgomery, Alabama office. United HealthCare transferred Petitioner to the position of Account Service Representative on

October 14, 1996. On April 11, 1997, Petitioner voluntarily resigned.

Petitioner's Complaint alleges that United HealthCare and Derico defrauded her when Derico allegedly promised her that she could transfer to United HealthCare's Birmingham, Alabama office. She claims she detrimentally relied on that alleged promise when she moved from Montgomery to Birmingham. Derico made the alleged promise in the line and scope of his employment with United HealthCare. Her Complaint also alleges that Derico's actions constitute intentional interference with business relations.

Respondents have denied Petitioner's allegations. Respondents contend that no one at United HealthCare promised Petitioner a job in Birmingham. Respondents further contend that, rather than relying on any alleged promise of Derico's, Petitioner moved to Birmingham so she could live with her boyfriend, a Birmingham resident.

When United HealthCare hired Petitioner, she was given a copy of its Employee Handbook (the "Handbook"). The Handbook contains an Internal Dispute Resolution Policy ("IDR") and an Arbitration Policy. The Handbook also contains an acknowledgment form (the "Acknowledgment") stating that the employee has received and reviewed the policies contained in the Handbook and that the employee agrees to arbitrate all employment-related disputes. Pet. App. 6. United HealthCare's IDR and arbitration policies are company wide: United HealthCare requires all of its employees, from the chief executive officer to entry level customer service

representatives, to sign the Arbitration Agreement as a condition of their employment. Pet. App. 2.

The Handbook not only thoroughly discusses United HealthCare's arbitration policy, the Acknowledgment also specifically refers to it twice. The Acknowledgment states that the employee agrees to arbitration as the final and exclusive forum for the resolution of all employment related disputes:

> **Internal Dispute Resolution/Employment Arbitration Policy** (section A5). . . . I understand that arbitration is the final, exclusive and required forum for the resolution of all employment related disputes which are based on a legal claim. I agree to submit all employment related disputes based on a legal claim to arbitration under UHC's policy.

Pet. App. 5-6. The Acknowledgment also confirms that the employee understands that, except for the arbitration policy, the Handbook is not an employment contract:

> [T]he provisions in this Handbook are guidelines and, *except for the provisions of the Employment Arbitration Policy*, do not establish a contract or any particular terms or condition of employment between myself and UHC.

Pet. App. 8 (emphasis added). McNaughton signed the Acknowledgment and thereby agreed to arbitrate all of her employment related claims. Pet. App. 2.

REASONS FOR DENYING THE WRIT

I. BECAUSE PETITIONER FAILED TO RAISE BELOW ANY ISSUE REGARDING § 1'S EXCLUSION OF HER INDIVIDUAL EMPLOYMENT CONTRACT FROM THE FEDERAL ARBITRATION ACT OR THE ALLEGED DEPRIVATION OF HER CONSTITUTIONAL RIGHTS TO TRIAL BY JURY AND DUE PROCESS, SHE MAY NOT RAISE THEM FOR THE FIRST TIME NOW

Petitioner requests that this Court grant certiorari to review whether § 1 of the FAA excludes her individual employment contract from the FAA's coverage, and whether there has been some deprivation of her constitutional rights to trial by jury and due process. However, because she never raised these issues below,[1] Petitioner must demonstrate that these issues are "very rare exceptions" to the rule that forecloses this Court's certiorari review of issues never raised below.

A. This Court Grants Certiorari to Review Issues Not Raised in a State Court Only in "Very Rare Exceptions"

This Court has been extremely reluctant to exercise its certiorari jurisdiction to review state court judgments

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[1] In her Reply Brief in Support of Petition for Writ of Mandamus Petitioner makes passing reference to a denial of "her access to a right to trial by a jury on the basis that she signed an acknowledgment of an Employee Handbook." App. 1. However, Petitioner only argued that the writing effectuating her waiver of that right was insufficient under Alabama contract law – not that the arbitration agreement itself amounted to a deprivation of her constitutional rights.

under 28 U.S.C. § 1257 when the issue was not raised below. Most recently, this Court held that it exercises certiorari jurisdiction only in "very rare cases" when the issue was not addressed or presented below:

> With *"very rare exceptions," Yee v. Escondido*, 503 U.S. 519, 533 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a Petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams v. Robertson, 520 U.S. 83, 86 (1997) (emphasis added). *See, e.g., Yee v. Escondido*, 503 U.S. 519, 533 (1992) (denying petition for writ of certiorari because, although the issue had been raised before the state supreme court, petitioners neither raised the issue in their complaint nor before the California Court of Appeals); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (dismissing writ because this Court learned for the first time during oral argument that issue had not been raised below); *Webb v. Webb*, 451 U.S. 493, 501 (1981) (dismissing petition after learning that issue was not raised below); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) (holding that petitioner must raise issue below "with fair precision and in due time"). This Court's reluctance to review issues on appeal that were not raised in the state courts below dates back to its beginnings. In the very early case of *Crowell v. Randall*, 35 U.S. 368 (1836), Justice Story, writing for the majority, indicated that this Court's appellate jurisdiction fails unless a federal question has been both raised and decided in a state court below. *See Crowell*, 35 U.S. at 375-76. Accordingly, this Court has been extremely reluctant to grant certiorari when reviewing issues that were not raised below.

B. There Are "Powerful Policy Considerations" for this Court's "Very Rare Exceptions" Doctrine

As this Court has noted, there are "powerful policy considerations" for this Court's "very rare exceptions" doctrine. *Webb*, 451 U.S. at 499. First, if the issue is not raised below, there will likely be an inadequate record for appellate review, *see Cardinale*, 394 U.S. at 439, because the parties did not have the "opportunity to develop the record necessary for adjudicating the issue," *Webb*, 451 U.S. at 500. Second, if state courts do not address the issue first, they will not have an opportunity to rely on independent and adequate state grounds to avoid a constitutional issue. *See id.* Third, when the parties present the issue to the state court, the state court's opinion on the issue spares this Court additional unnecessary work. *See id.* at 501 ("In terms of our own workload, this is a *very substantial matter.*") (emphasis added). Fourth, allowing state courts to address the issue first also helps ensure the proper federal-state comity. *See id* at 500. Thus, this Court should only grant certiorari in "very rare exceptions" where issues have not been raised below, and this case certainly does not present facts or circumstances justifying an exception.

C. This Court Should Not Grant Certiorari Because Petitioner Failed to Raise the FAA § 1 and Constitutional Issues Below

Because Petitioner failed to raise the FAA § 1 issue and constitutional issues below, this Court should not grant certiorari to consider them now. First, Petitioner

cannot dispute that she failed to raise the § 1 issue below. The Alabama Supreme Court specifically noted that the FAA's applicability to Petitioner's individual employment contract was a *"matter [that was] not raised by McNaughton."*[2] Pet. App. 4. (emphasis added). Both at the trial and appellate level, Petitioner never expressly or even implicitly questioned the FAA's applicability to her individual employment contract. App. 1-6, 8-17, & 27-41. United therefore has not had the opportunity to brief this issue or develop an adequate record for appellate review. Consequently, because Petitioner has failed to plead the particular claim at issue with "fair precision and in due time," this Court should not grant certiorari. *Zimmerman*, 278 U.S. at 67. This case is not one of the "very rare" cases for which this Court should make an exception to its rule because, as discussed below, the United States Courts of Appeals are *unanimous* on the FAA's applicability to individual employment contracts for non-transportation employees.

Second, Petitioner now seeks to argue for the first time the alleged violation of her Fifth, Seventh, and Fourteenth Amendment rights. App. 1-6, 8-17, & 27-41. However, the Alabama Supreme Court majority opinion is silent on these constitutional issues. Pet. App. 1-16. And,

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[2] Although the Alabama Supreme Court also noted in the same footnote that it believes § 1's exclusion of certain types of individual employment contracts do not apply to her employment contract with United HealthCare, it did so only in dictum. Therefore, Petitioner has failed to present this issue in a manner sufficient to satisfy this Court's jurisdictional and prudential requirements that state courts have the opportunity to "address" federal questions. *See Adams*, 520 U.S at 86.

"when the highest state court is silent on a federal question before us, [this Court] assume[s] that the issue was not properly presented." *Board of Directors of Rotary Int'l. v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). Thus, Petitioner bears the heavy burden of defeating this assumption by demonstrating that the state court had a "fair opportunity to address the federal question that is sought to be presented here." *Webb v. Webb*, 451 U.S. 493, 501 (1981). Petitioner cannot meet that burden based on the record below.

D. This Court Should Not Grant Certiorari Because Petitioner Failed to Comply with Rule 14.1(g)(i)

This Court also should not grant certiorari because Petitioner failed to follow Rule 14.1(g)(i) of this Court, which requires petitioners to specify when the issue was raised below. This Court adopted this rule so the parties could assist it when determining whether issues have been properly raised below. As this Court has explained, because it disfavors the filing of the record below before it grants certiorari, it is "largely dependent" on the parties when it determines whether the issue has been properly raised below. *See Webb*, 451 U.S. at 501. If a party fails to specify when the issue was raised below, that party's failure puts an extra burden on this Court. Thus, when a party fails to follow Rule 14.1(g)(i), this Court should not grant certiorari. *See* S. Ct. Rule 14.4 (giving this Court the ability to dismiss petitions that fail to present "with accuracy, brevity, and clarity whatever is essential to a ready and adequate understanding of the points requiring consideration").

In this case, there is no indication whatsoever from Petitioner that she raised the § 1 and constitutional issues below or that any Alabama state court has had the opportunity to address them. Because Petitioner failed to raise these issues before the Alabama state courts, she did not – and could not – comply with Rule 14.1(g)(i). Instead, in an apparent effort to prove that this particular question was put before the lower court, Petitioner quotes a dissenting opinion of an Alabama Supreme Court Justice, which summarily laments some imagined future loss of constitutional rights for employees who are required to arbitrate employment contracts under the FAA. Pet. 19. However, this citation establishes nothing more than the dissent's *sua sponte* speculation. It does not provide any reasonable basis from which this Court may infer that the issue was raised below. Moreover, not only did she fail to follow the letter of the rule, she also failed to follow the spirit of the rule. To fulfill her obligation to this Court, she should have at least pointed out her failure to raise the issue below and explained why, notwithstanding her failure, this Court should grant certiorari. Thus, for these reasons alone, this Court should deny her deficient petition.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER THE FEDERAL ARBITRATION ACT APPLIES TO PETITIONER'S INDIVIDUAL EMPLOYMENT CONTRACT BECAUSE THERE IS NOT A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS

Petitioner requests that this Court grant certiorari because there is a conflict among the United States Courts of Appeals regarding whether § 1 of the FAA would exclude her individual employment contract from the FAA's coverage. Pet. 10. This Court has long recognized that any conflict among the circuits must be a real conflict. *See, e.g., Sanchez v. Borras,* 283 U.S. 798-99 (1931) (After closely analyzing the facts of the cases allegedly in conflict, this Court dismissed a certiorari petition it had previously granted); *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 389 (1923) (dismissing certiorari because there was no "real and embarrassing conflict of opinion between the circuit courts of appeals"). Additionally, this Court has noted that dicta cannot create a conflict. *Wisconsin Elec. Co. v. Dumore Co.,* 282 U.S. 813, 813 (1931) ("It appearing that the asserted conflict in decisions arises from *differences in states of fact,* and *not in the application of a principle of law,* the writ of certiorari is dismissed as improvidently granted.") (emphasis added). Thus, if the only conflict among the circuits is illusory, or based on dicta, this Court should not grant certiorari.

Every United States Court of Appeals that has considered the scope of § 1's exclusion of individual employment contracts from the FAA has construed it narrowly, and stated that it applies only to transportation workers.

See, e.g., Brennan v. King, 139 F.3d 258, 264 n.5 (1st Cir. 1998); *Oldroyd v. Emira Sav. Bank, FSB*, 134 F.3d 72, 78 n.2 (2d Cir. 1998); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir. 1997); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); *Miller v. Public Storage Management, Inc.*, 121 F.3d 215, 218 (5th Cir. 1997); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 599-601 (6th Cir. 1995); *Koveleskie v. SBC Capital Markets*, 167 F.3d 361, 363-64 (7th Cir. 1999); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 836 (8th Cir. 1997); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 574-76 (10th Cir. 1998); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1060-61 (11th Cir. 1998) (Cox, J., concurring); *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1470-72 (D.C. Cir. 1997).

Although Petitioner requests that this Court resolve the "conflict" among the "United States courts of appeals and highest courts of the fifty states" regarding the scope of the exclusion of individual employment contracts from the FAA, she cites only one easily distinguishable decision, *Craft v. Campbell Soup Company*, 161 F.3d 1199 (9th Cir. 1998),[3] as creating a conflict among the circuits.[4] The Ninth Circuit in *Craft* merely holds that § 1 excludes all collective bargaining agreements from the FAA. In *Craft*, Anthony Craft worked for the Campbell Soup Company

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[3] Only days after Petitioner submitted her Petition for Writ of Certiorari, the Ninth Circuit amended its decision in *Craft v. Campbell Soup Co.*, 1999 WL 333189 (9th Cir. 1999). As discussed below, the amended Ninth Circuit decision emphasizes that the arbitration clause was in a collective bargaining agreement.

[4] Since Petitioner has not cited any cases from the "highest courts of the fifty states," United will only respond to the alleged conflict among the circuits.

("Campbell Soup") and was a member of the Food Process Workers and Warehousemen and Helpers Local Union (the "Union"). 1999 WL at *1. The Union had a collective bargaining agreement ("CBA") with Campbell Soup that contained a mandatory grievance/arbitration clause for discrimination claims. *See id.* Because, among other things, he believed that Campbell Soup discriminated against him based on his race, Craft filed a grievance pursuant to the CBA. Before the arbitrator resolved the grievance, Craft filed a complaint in district court alleging Title VII violations and state law claims. The district court compelled him to arbitrate his claims. *See id.*

In its amended decision to reverse the district court, the Ninth Circuit focused its reasoning in large part on the CBA. It reasoned that the Ninth Circuit and the Supreme Court had each expressed reluctance about applying the FAA to CBA's:

> We have repeatedly noted the Supreme Court's reluctance to hold the FAA applicable to labor disputes. *See Local 1020 of the United Brotherhood of Carpenters & Joiners of Am. v. FMC Corp.*, 658 F.2d 1285, 1290 (9th Cir. 1981) ("We note the reluctance of the Supreme Court to hold that the applicable arbitration proceedings involving labor disputes . . . .") *See also American Postal Workers Union of Los Angeles, AFL-CIO v. United States Postal Serv.*, 861 F.2d 211, 315 n.2 (9th Cir. 1988) ("Neither the Supreme Court nor this Court has ever held that the Federal Arbitration Act is applicable to arbitration of labor disputes.")

> We have also stated our own inclination not to apply the FAA to those disputes. *See Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1024 n.2 (9th Cir. 1991) (citing *Misco*, 484 U.S. at 40) (noting in dictum, that "labor arbitration . . . is not covered by the FAA"); *American Postal Workers*, 861 F.2d 215 (indicating that Congress did not mean the FAA to be used to review arbitration awards involving collective bargaining agreements); *Kemner v. District Council of Painting and Allied Trades No. 36*, 768 F.2d 1115, 1118 n.1 (9th Cir. 1985) (stating a similar principle); *San Diego County Dist. Council of Carpenters v. Cory*, 685 F.2d 1137, 1141 (9th Cir. 1982) (stating a similar principle); *FMC Corp.*, 658 F.2d at 1290 (citing with approval Justice Frankfurter's dissent in Lincoln Mills).

1999 WL 333189, *6. In its amended decision, the Court also quoted Justice Frankfurter's dissent in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), in which he urged the Court to hold explicitly – and not just implicitly – that the FAA does not apply to labor arbitrations:

> Naturally enough, I find rejection, though not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective bargaining agreements in the silent treatment given that Act by the Court's opinion. If an Act that authorizes the federal courts to enforce arbitration provisions in contracts generally, but specifically denies authority to decree that remedy for "contracts of employment," were available, the Court would hardly spin such powder out of the empty darkness of § 301. I would make this rejection explicit, recognizing that when Congress passed legislation to enable arbitration agreements to be enforced by the

> federal courts, it saw fit to exclude this remedy with respect to labor contracts.

1999 WL 333189, *7. Furthermore, the legislative history that the court discusses in its amended decision supports its holding that the FAA is inapplicable to a *CBA*, but is silent on the issue of the FAA's applicability to an *individual employment contract*. *Id.* at *6 ("It is not intended that this shall be an act referring to *labor disputes* at all.") (emphasis added). Because the Ninth Circuit added all of the language discussed in this paragraph to its amended decision, it clearly sought to underscore the significance of the CBA. Thus, it is inescapable that the Ninth Circuit focused its reasoning on the placement of the arbitration clause in the CBA. Therefore, the Ninth Circuit is not in conflict with the other United States Courts of Appeals because its statements about individual employment contracts are only dicta.

It is understandable that the Ninth Circuit focused its reasoning on the FAA's application to collective bargaining agreements and not on its application to individual employment contracts. As many lower courts and even this Court have recognized, while the FAA does not apply to collective bargaining agreements, it applies to individual employment contracts.[5] For instance, the Fifth

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[5] It is hardly surprising that courts have treated collective bargaining agreements differently from individual employment agreement because it was, after all, a union lobbyist who insisted upon the insertion of § 1. *See, e.g., American Postal Workers Union, AFL-CIO v. United States Postal Serv.*, 823 F.2d 466, 470-71 (11th Cir. 1987); *Signal-Stat Corp. v. Local 475, United Electric*, 235 F.2d 298, 302 (2d Cir. 1956); *Tenney Eng'g v. United Electrical Radio & Machine Workers of Am.*, 207 F.2d 450, 452 (3d

Circuit, in *Miller v. Public Storage Management, Inc.*, 121 F.3d 215 (5th Cir. 1997), distinguished its early precedent holding that the FAA applied to collective bargaining agreements. In that case, Public Store Management, Inc. ("Public Store") gave its employee, Janice Sue Miller, an employment contract to sign during a performance review. The employment contract contained a mandatory arbitration clause. After signing the contract, she injured her arm and took a medical leave of absence. When her employer fired her, she filed an EEOC charge and, subsequently, sued Public Store alleging ADA discrimination and state law retaliation. 121 F.3d at 217. After the district court granted Public Store's motion to compel arbitration, Miller appealed to the Fifth Circuit. The Fifth Circuit affirmed the district court even though in *Lincoln Mills v. Textile Workers Union*, 230 F.2d 81 (5th Cir. 1956), *rev'd on other grounds*, 353 U.S. 448 (1957), it had held that § 1 excludes all CBAs from the FAA. It distinguished *Lincoln Mills* because it only exempted "disputes arising under collective bargaining agreements" from the FAA. 121 F.3d at 218. Thus, the Fifth Circuit reasoned that its earlier CBA precedent did not apply to an individual employment contract case.

The Fifth Circuit is certainly not alone. Many other courts have distinguished between the FAA's inapplicability to collective bargaining agreements and its applicability to individual employment contracts. *See, e.g., O'Neil*, 115 F.3d at 274 n.1 (distinguishing its earlier holding collective bargaining precedent because it

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Cir. 1953); *Scott v. Farm Life Ins. Co.*, 827 F. Supp. 76, 78 (D. Mass. 1993).

"clearly does not apply to an *individual employment contract*") (emphasis added); *Miller*, 121 F.3d at 218 (distinguishing collective bargaining agreements from individual employment contracts); *Hull v. NCR Corp.*, 826 F. Supp. 303, 306-07 (E.D. Miss. 1993) ("FAA is applicable to *nonunion* employment contracts involving workers who are not involved in the transportation industry.") (emphasis added) (citation omitted); *Management Recruiters Int'l v. Nebel*, 765 F. Supp. 419, 421 (N.D. Ohio 1991) ("[E]mployment agreements involving *nonunion* workers, who are not involved in the transportation industry, are in fact covered by the FAA); *United Electric, Radio & Mechanical Workers v. Miller Products*, 215 F.2d 221 (4th Cir. 1954) (expressly limiting its § 1 holding to collective bargaining agreements).

This Court has suggested that, while the FAA does not apply to arbitration clauses in CBAs, the FAA applies to individual employment contracts. In *United Paperworkers v. Misco*, 484 U.S. 29 (1987), this Court went out of its way to explain in a footnote that, even though the FAA does not apply to arbitration clauses in CBAs, courts should look to the FAA for guidance:

> The *Arbitration Act does not apply to* "contracts of employment of . . . workers engaged in interstate commerce," 9 U.S.C. § 1 [9 USCS § 1], but the federal courts have often looked to the Act for guidance in *labor arbitration cases* . . . .

484 U.S. at 40 (emphasis added). Thus, this Court implicitly recognized that the FAA does not apply to CBAs.

On the other hand, this Court indicated in *Gilmer v. Interstate/Johnson Land*, 500 U.S. 200 (1991), that the FAA applies to some individual employment contracts. As the

District of Columbia Circuit has observed, "the result reached in *Gilmer* implicitly suggests that the FAA does not exclude all [individual] contracts of employment." 105 F.3d at 1472. To support its conclusion about this Court's implicit holding, it paraphrased part of Justice Stevens' dissent:

> [I]f the FAA actually excluded all employment contracts from the enforcement provisions of the FAA, it would be anomalous to compel arbitration of Gilmer's employment claims simply because the arbitration agreement was not formally part of a "contract of employment."

Id. (citing *Gilmer*, 500 U.S. at 40 (Stevens, J., dissenting)). Thus, a CBA case like *Craft* is easily distinguishable from an individual employment contract case like *McNaughton*. Therefore, since the United States Courts of Appeals and the Alabama Supreme Court are unanimous on the FAA's applicability to *individual employment contracts*, this Court should not waste its precious time reviewing this issue.

III. THE ALABAMA SUPREME COURT CORRECTLY DETERMINED THAT THE ARBITRATION AGREEMENT PETITIONER SIGNED IS A VALID, BINDING CONTRACT UNDER ALABAMA LAW

Petitioner argues that because the arbitration provision did not arise out of a "contract," the FAA does not apply to it. Although Petitioner correctly observes that the FAA only applies to certain types of "contracts," she misses the mark when she argues that this Court should second guess the Alabama Supreme Court's holding that the arbitration provision arose out of an enforceable contract pursuant to state law.

A. This Court Should not Grant Certiorari to Review Whether the Alabama Supreme Court Properly Applied Alabama Law

Petitioner requests that this Court review whether the Alabama Supreme Court correctly applied Alabama law in determining that the arbitration agreement Petitioner signed is a valid, binding contract. This issue does not implicate any of the grounds this Court has articulated in Supreme Court Rule 10 as warranting certiorari review because it does not implicate any federal issue.

The issue of what constitutes a binding contract under Alabama law is an issue for the Alabama Supreme Court. Who is better to determine what Alabama contract law is than the Alabama Supreme Court? Indeed, federal courts have the authority to, and often do, certify such state law issues to the highest courts of the states. Petitioner is asking this Court to waste its precious time to determine what Alabama contract law is even though the Alabama Supreme Court, the ultimate authority on the issue, has already decided the issue.

B. The Alabama Supreme Court Correctly Held that the Arbitration Agreement Is a Binding Contract under Alabama law

Even if this Court were to decide that it may review whether the Alabama Supreme Court correctly applied Alabama contract law, this Court should not grant certiorari because the Alabama Supreme Court correctly applied Alabama law. Petitioner argues that the arbitration agreement she signed is unenforceable because it was not accompanied by an employment contract. In

other words, Petitioner claims that her status as an at-will employee prevents her from being bound by an agreement to arbitrate all employment disputes with United. Petitioner's argument represents a fundamental misunderstanding of the arbitration agreement and its relation to her status as an at-will employee. The arbitration agreement is a contract under Alabama law, as the Alabama Supreme Court correctly concluded.

The arbitration agreement is incorporated into the Employee Handbook provided to McNaughton at the time of her hire. Upon receipt of the handbook, Petitioner executed a document titled "Code of Conduct and Employee Handbook Acknowledgment." Her Petition quotes a portion of the Acknowledgment, but omits a critical phrase of the UHC Employee Handbook through the use of an ellipses[6]:

McNaughton's Edited Version	**The Unedited Acknowledgment**
The provisions in this handbook are guidelines and . . . do not establish a contract or any particular terms or conditions of employment between myself and UHC. Pet. 15 (emphasis added).	The provisions in this handbook are guidelines and, except for the provisions of the Employee Arbitration Policy, do not establish a contract or any particular terms or conditions of employment between myself and UHC. Pet. App. 5 (emphasis supplied).

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[6] Although Petitioner includes the critical provision (*i.e.*, "except for the provisions of the Employee Arbitration Policy") in her quotation of the Acknowledgment in her Statement of Facts, she emphasizes the "do not establish a contract" language.

The Acknowledgment further provides in pertinent part as follows:

> I acknowledge that I have received a copy of the United HealthCare (UHC) Code of Conduct and the Employee Handbook. I understand that these documents contain important information on UHC's general personnel policies and on my obligations as an employee. I will remain familiar with, and agree to abide by these policies.
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> * * *
>
> **INTERNAL DISPUTE RESOLUTION/ EMPLOYMENT ARBITRATION POLICY** . . . These policies provide the opportunity for prompt and objective review of employment concerns. *I understand that arbitration is the final, exclusive and required forum for the resolution of all employment related disputes which are based on a legal claim. I agree to submit all employment related disputes based on a legal claim to arbitration under UHC's policy.*

App. 18; Pet. App. 5-6 (emphasis added).

Although Petitioner, like every other United employee, agreed to arbitrate all future employment-related disputes she might have with United in exchange for an offer of employment as an at-will employee, she argues that United's employment offer was insufficient consideration. According to Petitioner, an arbitration agreement can only be enforced if it is supported by something more than an offer of at-will employment – *i.e.*, an employment contract for a definite term. In its discussion of Alabama contract law, the Alabama Supreme Court squarely rejected Petitioner's argument based on Alabama law:

> [U]nder clear Alabama contract law, United's providing at-will employment to McNaughton constituted sufficient consideration in exchange for McNaughton's agreement to arbitrate her employment disputes under United's arbitration policy. This Court has consistently held that an employer's providing continued at-will employment is sufficient consideration to make an employee's promise to his employer binding. For example, in *Condelles v. Alabama Telecasters, Inc.*, 530 So. 2d 201, 204 (Ala. 1988), this Court stated that "continued [at-will] employment is sufficient consideration for signing a non-competition agreement." (Citing *Daughtry v. Capital Gas Co.*, 285 Ala. 89, 93, 229 So. 2d 480, 483 (1969).) Similarly, United's provision of new at-will employment to McNaughton was sufficient consideration to make McNaughton's promise to arbitrate employment disputes under United's arbitration policy a binding agreement.
>
> These conclusions are supported by *Kelly v. UHC Management Co.*, 967 F. Supp. 1240 (N.D. Ala. 1997), in which the United States District Court for the Northern District of Alabama held that an acknowledgment form signed upon receipt of an employee handbook and that contained language identical to the language of the acknowledgment form signed by McNaughton created a binding contract to arbitrate employment disputes . . . . The district court in *Kelly* held that the acknowledgment form signed by the employees created a binding agreement to arbitrate their claims against the employer. *Id.* at 1260. Accord *Beasley*, ___ So. 2d at ___ (stating that if an employee signs an acknowledgment form containing a binding arbitration clause, the

> employee will be required to arbitrate his claims) (citing *O'Neil v. Hilton Head Hospital*, 115 F.3d 272, 273 (4th Cir. 1997), and *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997)). Accordingly, we hold that the acknowledgment form signed by McNaughton created a binding agreement to arbitrate her claims against United.

Pet. App. 9.

Moreover, the Alabama Supreme Court correctly determined that under clear Alabama precedent, the Acknowledgment's arbitration provision constituted a contract. It noted that, if it held otherwise, it would impermissibly create different standards for arbitration clauses than other contract clauses under Alabama law, which is contrary to this Court's holding in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996):

> McNaughton's signed acknowledgment form indicates that the parties agreed to be bound by one provision of the employee handbook – the arbitration policy – but not by other provisions of the handbook. Under [*Crown Pontiac, Inc. v.*] *McCarrell*, 695 So. 2d [615] at 618-20 [(Ala. 1997)], the provision of the employee handbook to which McNaughton agreed to be bound – "I agree to submit all employment related disputes based on a legal claim to arbitration under [United's] policy" – is binding.[4] And the other provisions of the employee handbook to which McNaughton did not agree to bound – "I understand that the provisions in this Handbook are guidelines and, except for the provisions of the Employee Arbitration Policy, do not establish a contract" – are not binding. *Id.*

> *Given the clear precedent of McCarrell, to hold otherwise would treat arbitration clauses differently from other provisions of a contract, in contravention of the express holding of the Supreme Court of the United States.* See *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("Courts may not, however, invalidate arbitration agreements under state law applicable only to arbitration provisions. . . . By enacting § 2 [of the Federal Arbitration Act] . . . , Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts.' ") (citations omitted).
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>
> [4] Ordinarily, in order to constitute a contract, an employee handbook must evidence a clear intention to bind the employer and the employee. *Cf. Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725 (Ala. 1987). In this case, the strikingly clear language of the acknowledgment form signed by McNaughton – "I agree to submit all employment related disputes based on a legal claim to arbitration under [United's] policy" – evidences such an intent.

Pet. App. 6-7 (emphasis added).

Petitioner apparently relies upon *Chastain v. Robinson Humphrey*, 957 F.2d 851 (11th Cir. 1992), for the proposition that the Circuit Court improperly stayed this action. Petitioner's reliance upon that case is entirely misplaced. Even the Eleventh Circuit recognized the narrowness of its holding by noting the "unusual facts" of the case. 957 F.2d 851, 852. In that case, it was undisputed that the

plaintiff had not signed the brokerage agreement containing the arbitration clause. The sole issue presented to the Eleventh Circuit was whether the arbitrator or the district court should decide whether the plaintiff had agreed to arbitrate, *see id.* at 856, because "parties cannot be forced to submit to arbitration *if they have not agreed to do so*," *id.* at 854 (emphasis added). The Eleventh Circuit concluded that the district court should determine whether the plaintiff was bound by the arbitration language in the customer agreement because it was unclear whether the plaintiff had agreed to arbitrate. Here, it is undisputed that Petitioner *agreed to arbitrate*. Specifically, she signed the Acknowledgment in which she agreed to "submit all employment related disputes to arbitration." App. 6. Thus, the Eleventh Circuit's ruling in *Chastain* is not applicable to this case. Accordingly, the Alabama Supreme Court correctly concluded that the arbitration agreement constituted a valid, binding contract under Alabama law.

IV. ENFORCEMENT OF A VALID ARBITRATION AGREEMENT DOES NOT VIOLATE ANY RIGHT TO EQUAL PROTECTION, DUE PROCESS OR TRIAL BY JURY UNDER THE ALABAMA CONSTITUTION OR THE UNITED STATES CONSTITUTION

In the third section of her Petition for Writ of Certiorari, Petitioner argues with virtually no authority, that the arbitration agreement that she signed (the "Arbitration Agreement") violates her state and federal constitutional rights.

A. This Court Should Not Grant Certiorari to Determine Whether the Arbitration Agreement Petitioner Signed Violates Her Alabama Constitutional Rights

This Court should not grant certiorari to determine whether the Arbitration Agreement violates Petitioner's Alabama constitutional rights because this Court does not have jurisdiction under 28 U.S.C. § 1257, and because Petitioner has failed to specify the provision of the Alabama constitution it violates. First, this Court does not have jurisdiction to review the alleged violation of Petitioner's Alabama constitutional rights. Its sole statutory basis for reviewing state court judgments is 28 U.S.C. § 1257. Under that statute, to review a state statute or, by logical implication constitution, this Court must find that it is "repugnant to the Constitution, treaties, or laws of the United States . . . ." 28 U.S.C. § 1257(a). In this case, Petitioner alleges that the Arbitration Agreement violated her Alabama constitutional rights although she never argues that the Alabama constitution is "repugnant to the Constitution, treaties, or laws of the United States." Therefore, this Court does not have jurisdiction to grant certiorari on this issue. Second, Petitioner has failed to specify the provision of the Alabama constitution that the arbitration agreement allegedly violates. Therefore, for this Court to review this issue, it would have to search through the entire Alabama constitution to determine if any provision is applicable. Thus, this Court should not grant certiorari to review the alleged violation of Petitioner's Alabama constitutional rights.

B. This Court Should Not Grant Certiorari to Determine Whether the Arbitration Agreement that Petitioner Signed Violates Her Federal Constitutional Rights

This Court should not grant certiorari to determine whether the arbitration agreement that Petitioner signed violates her federal Constitutional rights. Petitioner alleges that the Arbitration Agreement violates her Fourteenth Amendment right to equal protection, Fifth Amendment right to due process, and Seventh Amendment right to a jury trial. Her Fourteenth Amendment and Fifth Amendment arguments fail because there is no state action and because arbitration protects parties' substantive and procedural rights. Her Seventh Amendment argument fails because parties do not have the right to a jury trial outside of an Article III forum.

1. Fourteenth Amendment Right to Equal Protection and Fifth Amendment Right to Due Process

This Court should not grant certiorari to determine whether the arbitration agreement that Petitioner signed violates her Fourteenth Amendment right to equal protection or her Fifth Amendment right to due process. First, to state an equal protection or due process claim, the petitioner must point to state action. *See, e.g.*, 167 F.3d at 368 ("[W]ithout *state action*, there can be no violation."); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171 (1972) (Fourteenth Amendment); United States Const. amend. XIV § 1 (" . . . nor shall *any State* . . . deny to any person the *equal protection* of the laws.") (emphasis added). In this case, Petitioner has failed to identify any

state action. Therefore, as a matter of well established constitutional law, Petitioner's equal protection and due process arguments fail.

Second, although Petitioner failed to articulate the basis for the alleged equal protection and due process violation, in *Koveleskie*, the Seventh Circuit recognized that equal protection and due process challenges to compulsory arbitration rest upon the mistaken assumption that a non-Article III forum cannot protect the party's right. *See* 167 F.3d at 368. The Seventh Circuit rejected this misguided notion because this Court in *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991), held that arbitration adequately protects a party's substantive and procedural rights. *See id.* at 369; *see also Gilmer*, 500 U.S. at 30-33 (rejecting arguments that arbitration does not protect a party's rights). Thus, because these challenges rest upon a mistaken assumption, and a disregard for *Gilmer*, this Court should not grant certiorari.

Petitioner cites *Heurtebise v. Reliable Business Computers*, 550 N.W.2d 243 (Mich. 1996), to support her inequality of bargaining power argument: employees do not always have the option of walking away from employment offers conditioned on the employee's agreement because jobs are not always "readily available." 550 N.W. 2d at 255. Appellant's argument misses the mark for two reasons. First, her brief fails to explain that this language is not taken from the majority opinion.[7] Second,

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[7] She cites section V of Justice Cavanagh's opinion. 550 N.W.2d at 258. Although Justices Levin and Mallett concurred with the entire opinion, Justice Boyle wrote separately concurring only with sections I, II, and VII. *Id.* Since Justices Brickley, Riley, and Weaver joined Justices Boyles' opinion,

this Court in *Gilmer* has squarely rejected the argument that employers cannot compel employees to arbitrate because of some inequality of bargaining power. 500 U.S. at 30. Thus, because this argument fails under this Court's own jurisprudence, this Court should not grant certiorari.

2. Seventh Amendment Right to a Jury Trial

This Court should not grant certiorari to review whether the arbitration agreement Petitioner signed violates her Seventh Amendment right to a jury trial. As the Seventh Circuit observed in *Koveleskie*, a party may waive its right to an Article III forum by agreeing to arbitrate. 167 F.3d at 368-69. Outside of an Article III forum, it does not have a right to a jury trial. *Id.* Therefore, when a party agrees to arbitrate, it effectively waives its right to a jury trial.

Appellant apparently cites *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), for the proposition that arbitration in some circumstances can violate an employee's Seventh Amendment right to a jury trial. This case, however, does not further Petitioner's argument because it does not represent this Court's current FAA jurisprudence and because it is clearly distinguishable. First, even Justice Almon's dissent in the Alabama Supreme Court implicitly acknowledges that this case does not represent this Court's modern FAA jurisprudence. Pet. App. 20-21 (*Bernhardt* had some validity

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section V is clearly not part of the majority opinion. *Id.* Her mistake is understandable given the unorthodox form of the opinion.

before this Court decided *Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)). Second, this Court in *Bernhardt* was primarily concerned with whether arbitration was a procedural or substantive right under the Eerie doctrine. Thus, since Petitioner's Seventh Amendment claim – like her other constitutional claims – has no merit, this Court should not grant certiorari.

CONCLUSION

Because there are no "compelling reasons" for this Court to grant certiorari, United respectfully requests that this Court deny McNaughton's Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF ALABAMA

CINDY L. MCNAUGHTON, Plaintiff, vs. UNITED HEALTHCARE SERVICES, INC., et al., Defendants.	)	CASE NUMBER: 1961708

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

Cindy L. McNaughton, plaintiff, files this, her reply to respondent's brief, and says as follows:

ARGUMENT

There Is No Enforceable Arbitration Agreement

It is undisputed that Cindy McNaughton never knowingly waived her right to resolve her claim through a judicial forum. Defendant United HealthCare, Inc., asserts that McNaughton may be denied her access to a right to trial by a jury on the basis that she signed an acknowledgement of an Employee Handbook. However, such an assertion is contrary to established Alabama law and the intent of the legislature that agreements to arbitrate may not be specifically enforced.

Contrary to the Defendant's assertions, no contract existed between McNaughton and United. Section 8-1-41(3), Ala. Code 1975, states that agreements to submit disputes to arbitration cannot be specifically enforced. *Crown Pontiac, Inc. v. Andrew McCarrell,* 1997

WL 200542 (Ala. 1997). Where the agreement "evidences a transaction . . . involving [interstate] commerce," the Federal Arbitration Act preempts this state policy and makes the agreement enforceable. *Costal Ford, Inc. v. Delmar Kidder,* 1997 WL 187098 (Ala. 1997). The FAA does not make all **arbitration clauses** in whatever writing enforceable; rather, it makes **arbitration agreements** enforceable. *Crown Pontiac,* 1997 WL 200542 at **2. (Emphasis in original). This determination of whether the parties agreed to arbitrate their disputes should be judged by the ordinary state-law principles that govern the formation of contracts. *Id.* (quoting *First Options of Chicago v. Kaplan,* 514 U.S. 938, ___, 115 S.Ct. 1920, 1924 (1995)).

Under principles of contract law, Cindy McNaughton was not accepting the terms of a contract when she signed an acknowledgement of receiving her employee handbook. Cindy McNaughton signed her name merely to acknowledge that she had received a set of documents, and the employee handbook recognized this fact by calling Cindy McNaughton's signature an "Employee Handbook Acknowledgement." Defendant's assertion that Cindy McNaughton's signature of acknowledgment be construed as a contract is absurd. Because there is no contract involving interstate commerce in this situation, the FAA exception to Alabama Code § 8-1-41(3) does not apply, and this language cannot be specifically enforced under Alabama law. McNaughton was not agreeing to arbitration, she was acknowledging the receipt of her employee handbook.

Furthermore, there is no arbitration agreement in this case by which Cindy McNaughton can be bound. The

language addressing arbitration is merely a section of the employee handbook. Under the FAA, **arbitration agreements** may be enforceable where there is a transaction involving interstate commerce, however, the FAA does not make all **arbitration clauses** enforceable. In this case the relevant language is only a clause of the much larger employee handbook. One clause cannot be considered an arbitration agreement, therefore this language is not enforceable under Alabama law.

The Ninth Circuit recently recognized in *Nelson v. Cypress Bagdad Copper Corporation*, 119 F.3d 756 (9th Cir., July 10, 1997), that an employee does not agree to be bound by the provisions of an employee handbook when she signs an acknowledgment form. In *Nelson*, the court held that the plaintiff did not waive his right to judicial forum merely by signing an acknowledgment form. *Nelson*, 119 F.3d at 761. The court noted that the acknowledgment form itself suggested that the handbook was a guideline to the company's unilaterally promulgated policies and procedures, and that merely signing the form did not in any way constitute a knowing agreement to arbitrate and thereby surrender his statutory right to a judicial forum. *Id.* The court noted that any bargain to waive the right to a judicial forum must at the least be an express agreement. *Id.* at 762. The choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question. *Id.*

Because there was no express agreement, the court in *Nelson* found that the unilateral promulgation by an employer of arbitration provisions in an employee handbook does not constitute a knowing agreement on the part of an employee to waive a statutory remedy. *Id.* The

court also found that the right to judicial forum is not waived, even though the handbook is furnished to the employee and the employee acknowledges its receipt and agrees to understand its contents, and even though the employee performs his obligations by commencing or continuing to do his assigned work and accepting a pay-check in return. *Id.*

Under the reasoning of the Ninth Circuit and established Alabama law, Cindy McNaughton did not expressly waive her right to a judicial forum when she signed a paper stating that she had received her copy of the employee guidelines. McNaughton, to waive her right to a judicial forum, must enter into a knowing agreement to waive such a right. The argument that a signature intended as an acknowledgement should be construed as a contract is unjust and unfair and should be dismissed by this court.

This Arbitration Clause is not Mutually Binding

Assuming arguendo that Cindy McNaughton's acknowledgment of receiving her employee handbook could in some way be twisted to create a contract, then the lack of mutuality in such contract is apparent on the face. As stated in *Northcom v. R.E. James,* 1997 WL 233918 ((Ala) 1997):

> " . . . Therefore, we hold that, in a case involving a contract of adhesion, if it is not shown that the party in an inferior bargaining position had a meaningful choice of agreeing to arbitration or not, and if the superior party has reserved to itself the choice of arbitration or litigation, a court may deny the superior party's motion to

> compel arbitration based on the doctrine of mutuality of remedy and unconscionability . . . The element of unconscionability in the context of an arbitration clause is supplied by the fact that, by agreeing to arbitrate, a party waives his right to "a remedy by due process of law," Ala. Const. 1901, § 11, and U.S. Const. Amend. VII. To allow such a wavier in an adhesion contract without a showing that it was voluntarily made might well be unconscionable."
>
> *Northcom*, 1997 WL 233918 at *5.

To bind Cindy McNaughton to the language of the arbitration clause in the present case would most certainly be unconscionable. While Defendant United HealthCare did not agree to arbitrate any and all disputes arising out of the employee agreement, and in fact, did not agree to anything at all, the Defendant seeks to have Cindy McNaughton bound by such language. To be held to the language of an arbitration agreement, Cindy McNaughton must voluntarily waive her right to a trial by jury, and this she did not do.

Defendant offers a recent case from this court, *Ex parte Isbell*, 1997 WL 531100 ((Ala.) 1997), as controlling, but defendant is in error. In *Isbell* the court noted that the [sic], along with the contract involved in *Northcom* there had been no allegations that the contract was one of adhesion. *Id.* at *3 This case is inapposite. In the present case it has been alleged that the employee handbook, if a to [sic] be construed as contract, would be definitely be one of adhesion. Therefore the *Isbell* holding has not application to this case.

CONCLUSION

This court should find that Cindy McNaughton's signature acknowledging receipt of her employee guidelines does not effectively deny her constitutional right to a trial by jury. A writ of mandamus should be issued directing the circuit court to reconsider its earlier order granting defendants' motion to stay proceedings based on the Federal Arbitration Act, on the ground that the alleged arbitration agreement is invalid and unenforceable.

PLAINTIFF RESPECTFULLY REQUESTS ORAL ARGUMENT ON THE ABOVE PETITION FOR WRIT OF MANDAMUS.

/s/ W. Lewis Garrison
W. Lewis Garrison, Jr.,
GAR008

/s/ Kathy H. Sumrall
Kathryn H. Sumrall SUM002

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(205) 326-3336

CERTIFICATE OF SERVICE

Plaintiff certifies that she has served a copy of the above and foregoing by hand delivery on this the 12th day of September, 1997, addressed as follows:

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Nathan R. Norris
ENGEL, HAIRSTON AND JOHANSON, P.C.
P.O. Box 370027
Birmingham, Alabama 35237

/s/ W. Lewis Garrison
OF COUNSEL

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

CINDY L. MCNAUGHTON, Plaintiff, vs. UNITED HEALTHCARE SERVICES, INC., a corporation; TONY DERICO; A, the person, firm, or corporation employing TONY DERICO, B, the correct identities of persons or entities responsible for the acts and omissions contained in the Complaint; and C, the correct designation of the person, firm or corporation responsible for the fraudulent suppression and/or misrepresentation to the plaintiff; the correct identities of which are unknown at the present time but will be added by amendment when duly ascertained; Defendants.	)	CIVIL ACTION NO. CV 97-02058

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO STAY FURTHER PROCEEDINGS PURSUANT TO THE FEDERAL ARBITRATION ACT

Plaintiff Cindy McNaughton submits this memorandum in opposition to Defendants' motion to stay further proceedings pursuant to the Federal Arbitration Act.

Background

In July of 1996, plaintiff was hired by defendant United HealthCare in Montgomery, Alabama, as an Account Service Coordinator. The United employee handbook expressly provided that plaintiff's employment with United was "at-will". In October of 1996, plaintiff was transferred to the position of Account Service Representative. She received a substantial increase in salary. In February of 1997, plaintiff expressed a desire to transfer to United's Birmingham office. On February 22, 1997, she attended an interview with defendant Tony DeRico, Medicare Complete Supervisor for United's Birmingham office. At the close of the February 22, 1997 interview, DeRico offered plaintiff a position with the Birmingham office and asked her when she could begin work. Plaintiff stated that she had to notify the Montgomery office of her transfer. DeRico said he needed her to start as soon as possible and that he would talk to her supervisor the following Monday. In reliance on these representations, plaintiff notified United's Montgomery office that she would be transferring to Birmingham, forfeited her lease deposit in Montgomery, sold her furniture, and moved to Birmingham.

On or about March 5, 1997, in preparation for her new position, plaintiff picked up reading materials from United in Birmingham.

On or about March 17, 1997, United's Human Resources department contacted plaintiff and told her that the Birmingham position had been filled by a more qualified applicant.

At no time did any agent or representative of United inform plaintiff that she did not have the Birmingham job. At no time did any agent or representative of United, including defendant Tony DeRico, tell the plaintiff that United was interviewing other applicants for the position. At no time during her conversations with various people at United in Birmingham was plaintiff told that there was even a remote possibility that she would not get the job. Defendants were well aware that plaintiff planned to and eventually did move to Birmingham in reliance on their representations as to her transfer of employment. Defendants went so far as to provide Plaintiff information to prepare her for her new position in Birmingham. Defendants were also aware that Plaintiff did not actually have a job with United in Birmingham, and they failed to inform her of this fact.

Plaintiff has attempted to utilize United's internal dispute resolution process. United merely agreed to reimburse plaintiff her mileage for commuting from Birmingham to Montgomery and her lost lease deposit.

Plaintiff's position at United in Montgomery has been filled. As a result of this incident she has been forced to take another job with a reduced salary and fewer benefits. She has suffered extreme mental and emotional distress.

On April 7, 1997, Plaintiff filed a complaint in the Circuit Court of Jefferson County. On April 22, 1997, Defendants filed a motion to stay further proceedings pursuant to the Federal Arbitration Act. Defendants allege in their motion that the plaintiff executed a "contract", and that this "contract" established mandatory,

binding arbitration as the exclusive remedy for all employment related disputes.

Defendants' motion is due to be denied. The arbitration agreement upon which defendants base their contention that this case should be submitted to arbitration is invalid and unenforceable.

The Arbitration Clause is Not Part of a Contract

The plain language of 9 U.S.C. §3, the Federal Arbitration Act, provides for enforcement of an arbitration agreement if it is part of any maritime transaction, or part of a contract evidencing a transaction involving commerce. The Supreme Court of the United States has interpreted this to mean that there are three kinds of arbitrable agreements: 1) those involving maritime transactions; 2) those covering the submission of a dispute that exists when the arbitration agreement is executed; and 3) those that concern a written provision *in a contract* involving commerce. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 645 (1985). (Emphasis added) None of these circumstances are applicable to the case at bar.

9 U.S.C. § 3 provides for enforcement of an agreement to arbitrate if it is a written provision in any maritime transaction or a *contract* evidencing a transaction involving commerce. The employment agreement in the present case, by its own terms, was "at-will". There was no contract between Plaintiff and Defendants. Plaintiff could leave United at any time for any reason, and United could discharge Plaintiff at any time for any reason. Plaintiff could not maintain an action for breach of

contract. No contractual relationship existed between Plaintiff and Defendant United. Since there was no contract, it necessarily follows that the arbitration clause is not a written provision *in a contract*, as is mandated by 9 U.S.C. § 2, and therefore is not a valid agreement to arbitrate under the Federal Arbitration Act.

It is well established under Alabama law that generally, an employee is terminable at will. *Howard v. Wolff Broadcasting Corporation*, 611 So.2d 307 (Ala. 1992); *McCluskey v. Unicare Health Facility, Inc.*, 484 So.2d 398 (Ala. 1986); *Kitsos v. Mobile Gas Service Corp.*, 431 So.2d 1150 (Ala. 1983). In *White v. Chelsea Industries, Inc.*, 425 So.2d 1090 (Ala. 1983), the plaintiff's claim that an employee handbook rose to the level of a contract of employment failed because the court held that the handbook did not vary the general common law rule that an employee is terminable at will. The Alabama Supreme Court has recognized that a plaintiff may not allege breach of contract if she is an employee at will. *Miller v. SCI Systems, Inc.*, 479 So.2d 718 (Ala. 1985). Under Alabama law, Cindy McNaughton was an employee at will of Defendant United. By the terms of United's Employee Handbook, no contract existed between McNaughton and United.

McNaugton received a copy of Defendant United HealthCare's Code of Conduct and Employee Handbook Acknowledgment form when she was originally hired by United. This form, attached hereto as Exhibit A, provides in pertinent part:

At-Will Employment

> I understand that the provisions in this Handbook are guidelines and, except for the provisions of the Employment arbitration Policy, do not establish a contract or any particular terms or condition of employment between myself and UHC. None of the policies constitute or are intended to constitute a promise of employment. I further understand that UHC may periodically, at its discretion, change, rescind, or add to any policies, benefits or practices with or without prior notice.
>
> I understand that the employment relationship is "at will" and is based upon the mutual consent of myself and UHC. Accordingly, I agree that UHC or I may terminate the employment relationship at any time and for any reason, with or without notice or prior discipline.

There is no question that the employment arrangement between Plaintiff and Defendants was "at-will". Where there is no presumptively valid general contract, the ict [sic] Court's duty to compel arbitration pursuant to the Federal Arbitration Act is not triggered. *Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851 (1992). A contract did not exist between Cindy McNaughton and United HealthCare Corporation, and as such the arbitration clause is not a valid and enforceable arbitration agreement under the Federal Arbitration Act.

In *Chastain*, the Eleventh Circuit held that because there was no presumptively valid general contract, the District Court was not required to compel arbitration pursuant to the Federal Arbitration Act. *Chastain* involved a plaintiff who had not actually signed the

contract that was the basis of the arbitration claim. In the present case, Plaintiff signed an acknowledgment *form*, not a contract. The arbitration clause was not part of a valid contract, and standing alone it does not constitute a contract between Plaintiff and Defendant United.

The Arbitration Clause is not Mutually Binding

Under Alabama law, the basic elements of a contract are an offer and acceptance, consideration, and mutual assent to the essential terms of the agreement. *Strength v. Alabama Dept. of Finance, Div. of Risk Management*, 622 So.2d 1283 (Ala. 1993). The arbitration clause in the present case fails for lack of mutuality. Defendant United HealthCare did not agree to arbitrate any and all disputes arising out of the employment agreement. In fact, Defendant United HealthCare did not agree to anything at all.

United's employee handbook has a section entitled "United HealthCare Corporation Employment Arbitration Policy" which states under subpart A, Statement of Intent, as follows:

> While arbitration is an essential element of your employment relationship and is a condition of your employment, nothing in this Policy creates or is intended to create any other specific term or condition relating to employment. **United HealthCare reserves the right to alter, amend, modify, or revoke this Policy at its sole and absolute discretion at any time with or without notice.**

(Emphasis Added) (Attached hereto as Exhibit B) The United HealthCare Employee Handbook is incorporated by reference into the Code of Conduct and Employee

Handbook Acknowledgment form, and the form itself states:

> **I further understand that UHC may periodically, at its discretion, change, rescind, or add to any policies, benefits or practices with or without prior notice.**

(Emphasis Added) (Attached hereto as Exhibit C) Defendant United is not bound by the arbitration clause in the employment agreement.

Hull v. Norcom, Inc., 750 F.2d 1547 (11th Cir.1985) is a case directly on point. In *Hull* the plaintiff was a former employee who brought an action seeking damages and a claim that his employment contract was invalid because of defendant Norcom's alleged fraud in the inducement to enter into the contract. Norcom filed a motion to compel arbitration based on an arbitration provision in the contract. The arbitration provision reserved defendant Norcom's right to a judicial forum in certain circumstances. The district court found the arbitration clause in the employment contract invalid for lack of consideration, and the Eleventh Circuit upheld that decision. The court based its holding on the fact that Norcom's obligation was illusory. The arbitration clause was not mutually binding under contract law; Norcom had reserved the option to raise and resolve disputes that it may have against another party in a court of law rather than through arbitration. The Eleventh Circuit found that the consideration underlying the agreement between Hull and Norcom was insufficient to support the enforcement of an arbitration provision which was unilaterally binding. The court went on to hold that the consideration exchanged for one party's promise to arbitrate must be

the other parties' promise to arbitrate at least some specified class of claims. Mere presence of an arbitration clause is insufficient to enforce the arbitration agreement. The *Hull* case is strikingly similar to the case at bar, the only difference being that in *Hull* the defendant Norcom agreed to *something*. In the present case defendant United has reserved the right to change any provision of the arbitration agreement in any way it pleases, at any time it pleases, without notice to anyone. United has agreed to absolutely *nothing*. The arbitration clause in the employee handbook is invalid and unenforceable because it is not binding on defendant United HealthCare.

Conclusion

The Alabama Supreme Court has just recently begun to enforce arbitration clauses *in contracts*. In the case of *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. ___, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995), the United States Supreme Court held that Alabama's Code Section 8-1-43(3), which prohibited the specific enforcement of an agreement to submit a controversy to arbitration, is preempted by the Federal Arbitration Act. *Allied-Bruce* involved a termite prevention *contract*. The case that defendants cite in support of their motion to stay, *Mitsubishi Motors Corp. V. Soler Chrysler-Plymouth, Inc.*, infra, involved a contractual agreement between plaintiff and defendant. The Federal Arbitration Act provides for enforcement of arbitration agreements in a maritime transaction, regarding a controversy in existence when the agreement is signed, or *in a contract*. The arbitration agreement in the instant case is none of the above and is

invalid and unenforceable. It is not part of a valid contract, and, standing alone, it is not binding on defendant United HealthCare. Plaintiff should be allowed to pursue her claims against United in the appropriate judicial forum.

/s/ W. Lewis Garrison, Jr.
W. Lewis Garrison, Jr.,
GAR008

/s/ Ashley M. Taylor
Ashley M. Taylor, TAY047

OF COUNSEL:

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CERTIFICATE OF SERVICE

Plaintiff certifies that she has served a copy of the above and foregoing by U.S. mail on this the 22nd day of May, 1997, addressed as follows:

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Miriam Gibson Harris
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/s/ Ashley M. Taylor
OF COUNSEL

PLAINTIFF'S EXHIBIT A

United HealthCare **Code of Conduct and Employee Handbook Acknowledgement**

I acknowledge that I have received a copy of the United HealthCare (UHC) Code of Conduct and the Employee Handbook. I understand that these documents contain important information on UHC's general personnel policies and on my obligations as an employee. I will remain familiar with, and agree to abide by these policies.

Code of Conduct

It is of the highest importance to UHC to conduct its business and operations in compliance with applicable law and sound business ethics. I understand that it is my obligation to comply with UHC's Code of Conduct, including the obligation to report violations of the law or the Code of Conduct policy. I will carry out my responsibilities for UHC in accordance with the Code of Conduct and applicable law.

Employee Handbook

At-Will Employment

I understand that the provisions in this Handbook are guidelines and, except for the provisions of the Employment Arbitration Policy, do not establish a contract or any particular terms or condition of employment between myself and UHC. None of the policies constitute or are intended to constitute a promise of employment. I further understand that UHC may periodically, at its discretion,

change, rescind, or add to any policies, benefits or practices with or without prior notice.

I understand that the employment relationship is "at will" and is based upon the mutual consent of myself and UHC. Accordingly, I agree that UHC or I may terminate the employment relationship at any time and for any reason, with or without notice or prior discipline. I understand that only the Chief Executive Officer or the Senior Executive of Human Resources, in a written and signed document, have the authority to make a binding contract or promise relating to employment or to modify "at-will" employment for any employee under any circumstance.

Specific Acknowledgements

I acknowledge that I have specifically received and reviewed the policies referenced below at the time I received this Handbook and agree to abide by these policies.

Sexual and Other Harassment (pages A3-1 through A3-2). Harassment based on age, race, gender, color, religion, national origin, disability, marital status, covered veteran status, sexual orientation, status with respect to public assistance, or any other characteristic protected under state, federal or local law is prohibited in any form at the workplace, at work related functions, anywhere UHC employees are performing their jobs, or which occurs outside of work but effects the workplace. I understand UHC's complaint procedure and prohibition of retaliation and agree to abide by this policy.

Insider Trading (section A4). I acknowledge that in carrying out my assigned responsibilities, I may obtain information that is considered material non-public information. I understand that it is my obligation to protect such information and to comply with UHC's Insider Trading policy.

PLAINTIFF'S EXHIBIT B

UNITED HEALTHCARE CORPORATION EMPLOYMENT ARBITRATION POLICY

A. STATEMENT OF INTENT

United HealthCare Corporation and its subsidiaries (referred to as "United HealthCare") value each of their employees and look forward to good relations with, and among, all employees. Occasionally, however, disagreements may arise between an individual employee and United HealthCare or between employees in a context that involves United HealthCare. United HealthCare believes that the resolution of those types of disagreements are best accomplished by internal dispute review ("IDR") and, where that fails, by arbitration conducted under the rules of the American Arbitration Association. Employees and United HealthCare benefit from the use of private arbitration because it usually results in quicker, less costly resolution of disagreements than litigation in state or federal courts. For these reasons, United HealthCare has adopted this Employment Arbitration Policy (the "Policy").

This Policy does not constitute a promise or agreement that your employment will continue for any specified period of time or end only under certain conditions. Employment at United HealthCare is a voluntary relationship existing for no definite period of time, and nothing in this Policy or any other United HealthCare document creates or is intended to create an express or implied contract of employment. While arbitration is an essential element of your employment relationship and is a condition of your employment, nothing in this Policy

creates or is intended to create any other specific term or condition relating to your employment. United HealthCare reserves the right to alter, amend, modify, or revoke this Policy at its sole and absolute discretion at any time with or without notice. The Senior Executive, Human Resources, has the sole authority to alter, amend, modify or revoke this Policy.

B. SCOPE OF POLICY

Arbitration is the final, exclusive and required forum for the resolution of all employment related disputes which are based on a legal claim. Since many employment disputes can be successfully resolved in the IDR process, an employee cannot use this Policy unless they have first completed the IDR process. If an employment related dispute is not resolved through the IDR process and the matter is based on a legal claim, any party to the dispute may initiate the arbitration process.

A dispute is based on a legal claim and is subject to this Policy if it arises or involves a claim under any federal, state or local statute, regulation or common law doctrine regarding or relating to employment discrimination, terms and conditions of employment, or termination of employment including, but not limited to, the following: Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Rehabilitation Act of 1973, the Americans With Disabilities Act, the Employee Retirement Income Security Act of 1974, and all applicable amendments; state human rights or fair

employment practices laws; breach of contract, promissory estoppel, or any other contract theory; and defamation, employment negligence, or any other tort theory. This Policy does not preclude an employee from filing a claim or charge with a governmental administrative agency, such as the National Labor Relations Board, the Department of Labor, and the Equal Employment Opportunity Commission.

The arbitrator will be bound by the applicable law of the jurisdiction under which the dispute arises. This Policy covers any dispute subject to arbitration which is brought on or after the applicable effective

PLAINTIFF'S EXHIBIT C

United HealthCare **Code of Conduct and Employee Handbook Acknowledgement**

I acknowledge that I have received a copy of the United HealthCare (UHC) Code of Conduct and the Employee Handbook. I understand that these documents contain important information on UHC's general personnel policies and on my obligations as an employee. I will remain familiar with, and agree to abide by these policies.

Code of Conduct

It is of the highest importance to UHC to conduct its business and operations in compliance with applicable law and sound business ethics. I understand that it is my obligation to comply with UHC's Code of Conduct, including the obligation to report violations of the law or the Code of Conduct policy. I will carry out my responsibilities for UHC in accordance with the Code of Conduct and applicable law.

Employee Handbook

At-Will Employment

I understand that the provisions in this Handbook are guidelines and, except for the provisions of the Employment Arbitration Policy, do not establish a contract or any particular terms or condition of employment between myself and UHC. None of the policies constitute or are intended to constitute a promise of employment. I further understand that UHC may periodically, at its discretion,

change, rescind, or add to any policies, benefits or practices with or without prior notice.

I understand that the employment relationship is "at will" and is based upon the mutual consent of myself and UHC. Accordingly, I agree that UHC or I may terminate the employment relationship at any time and for any reason, with or without notice or prior discipline. I understand that only the Chief Executive Officer or the Senior Executive of Human Resources, in a written and signed document, have the authority to make a binding contract or promise relating to employment or to modify "at-will" employment for any employee under any circumstance.

Specific Acknowledgements

I acknowledge that I have specifically received and reviewed the policies referenced below at the time I received this Handbook and agree to abide by these policies.

Sexual and Other Harassment (pages A3-1 through A3-2). Harassment based on age, race, gender, color, religion, national origin, disability, marital status, covered veteran status, sexual orientation, status with respect to public assistance, or any other characteristic protected under state, federal or local law is prohibited in any form at the workplace, at work related functions, anywhere UHC employees are performing their jobs, or which occurs outside of work but affects the workplace. I understand UHC's complaint procedure and prohibition of retaliation and agree to abide by this policy.

Insider Trading (section A4). I acknowledge that in carrying out my assigned responsibilities, I may obtain information that is considered material non-public information. I understand that it is my obligation to protect such information and to comply with UHC's Insider Trading policy.

IN THE SUPREME COURT OF ALABAMA

CINDY L. MCNAUGHTON, Plaintiff,	)	CASE NUMBER: _____
vs.	)	
UNITED HEALTHCARE SERVICES, INC., et al., Defendants.	)	

PETITION FOR WRIT OF MANDAMUS

W. LEWIS GARRISON, JR.
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July 10, 1997

IN THE SUPREME COURT OF ALABAMA

CINDY L. MCNAUGHTON, Plaintiff,	)	CASE NUMBER: _____
vs.	)	
UNITED HEALTHCARE SERVICES, INC., et al., Defendants.	)	

PETITION FOR WRIT OF MANDAMUS

Cindy L. McNaughton, plaintiff, files this, her petition for a writ of mandamus, and says as follows:

I. STATEMENT OF THE CASE

Plaintiff filed her complaint, request for production, request for admission, and deposition notice in this case, Case Number 97-2058, on April 7, 1997. The basis of plaintiff's complaint was fraud and intentional interference with business relations. It involves an incident whereby plaintiff was promised a transfer of employment with defendant, acted in reliance on defendants' representations of a transfer, and was subsequently told that her transfer position had been filled by a more qualified applicant. A copy of said complaint and discovery is attached hereto as Exhibit A. On April 22, 1997, Defendants filed a motion to stay further proceedings pursuant to the Federal Arbitration Act, attached hereto as Exhibit B. On April 23, 1997, Defendants filed a motion to extend time for filing answer and stay discovery, attached hereto as Exhibit C. In support of these motions defendants alleged that plaintiff had executed a valid arbitration agreement, and that this agreement established mandatory and binding arbitration as the exclusive remedy for all employment related disputes. The motion to extend time for filing answer and stay discovery was heard on May 5, 1997 before Judge Jack D. Carl, Circuit Court of Jefferson County, Alabama. At this hearing, Judge Carl granted defendants' motion until such time as he ruled on their motion to stay further proceedings pursuant to the Federal Arbitration Act. On June 12, 1997, Judge Carl granted defendants' motion to stay all proceedings based on the alleged arbitration agreement. See copy of order, attached hereto as Exhibit D. It is this order that plaintiff seeks to have reviewed by writ of mandamus.

II. STATEMENT OF THE FACTS

In July of 1996, plaintiff was hired by defendant United HealthCare in Montgomery, Alabama, as an Account Service Coordinator. The United employee handbook expressly provided that plaintiff's employment with United was "at-will" Exhibit E. In October of 1996, plaintiff was transferred to the position of Account Service Representative. She received a substantial increase in salary. In February of 1997, plaintiff expressed a desire to transfer to United's Birmingham office. On February 22, 1997, she attended an interview with defendant Tony DeRico, Medicare Complete Supervisor for United's Birmingham office. At the close of the February 22, 1997 interview, DeRico offered plaintiff a position with the Birmingham office and asked her when she could begin work. Plaintiff stated that she had to notify the Montgomery office of her transfer. DeRico said he needed her to start as soon as possible and that he would talk to her supervisor the following Monday in reliance on these representations, plaintiff notified United's Montgomery office that she would be transferring to Birmingham, forfeited her lease deposit in Montgomery, sold her furniture, and moved to Birmingham.

On or about March 5, 1997, in preparation for her new position, plaintiff picked up reading materials from United in Birmingham.

On or about March 17, 1997, with full knowledge that plaintiff now resided in Birmingham and was waiting to begin work with United's Birmingham office, United's Human Resources department contacted plaintiff and

told her that the Birmingham position had been filled by a more qualified applicant.

At no time did any agent or representative of United inform plaintiff that she did not have the Birmingham job. At no time did any agent or representative of United, including defendant Tony DeRico, tell the plaintiff that United was interviewing other applicants for the position. At no time during her conversations with various people at United in Birmingham was plaintiff told that there was even a remote possibility that she would not get the job. Defendants were well aware that plaintiff planned to and eventually did move to Birmingham in reliance on their representations as to her transfer of employment. Defendants went so far as to provide Plaintiff information to prepare her for her new position in Birmingham. Defendants were also aware that Plaintiff did not actually have a job with United in Birmingham, and they failed to inform her of this fact.

Plaintiff's attempts to utilize United's internal dispute resolution process proved futile. United merely agreed to reimburse plaintiff her mileage for commuting from Birmingham to Montgomery and her lost lease deposit.

Plaintiff's position at United in Montgomery has been filled as a result of this incident she has been forced to take another job with a reduced salary and fewer benefits. She has suffered extreme mental and emotional distress.

Defendants claim that this case should be submitted to arbitration. In support of this contention they assert that the plaintiff executed a "contract", and that this

"contract" established mandatory, binding arbitration as the exclusive remedy for all employment related disputes. It is plaintiff's position that the alleged arbitration agreement is invalid and unenforceable.

III. STATEMENT OF THE STANDARD OF REVIEW

A writ of mandamus is an extraordinary remedy and requires a showing that there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court. *Ex parte Edgar,* 543 So.2d 682 (Ala. 1989). The last two requirements are met from the outset; a petition for writ of mandamus is the proper means to challenge a trial court's order granting a motion to compel arbitration. *Ex parte Phelps,* 672 So.2d 790 (Ala. 1995). Plaintiff Cindy McNaughton has a clear legal right to have her claims heard by the court. Defendants have refused her this right by asserting the enforceability of an invalid arbitration agreement.

IV. STATEMENT OF THE ISSUE

Whether the circuit court erred in granting the defendants' motion to stay proceedings pursuant to the Federal Arbitration Act?

ARGUMENT

The Arbitration Clause is Not Part of a Contract

The plain language of 9 U.S.C. § 3, the Federal Arbitration Act, provides for enforcement of an arbitration agreement if it is part of any maritime transaction, or part of a contract evidencing a transaction involving commerce. The Supreme Court of the United States has interpreted this to mean that there are three kinds of arbitrable agreements: 1) those involving maritime transactions; 2) those covering the submission of a dispute that exists when the arbitration agreement is executed; and 3) those that concern a written provision *in a contract* involving commerce. *Mitsubishi Motors Corp. V. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 645 (1985). (Emphasis added) None of these circumstances are applicable to the case at bar.

9 U.S.C. § 3 provides for enforcement of an agreement to arbitrate if it is a written provision in any maritime transaction or a *contract* evidencing a transaction involving commerce. The employment agreement in the present case, by its own terms, was "at-will". There was no contract between Plaintiff and Defendants. Plaintiff could leave United at any time for any reason, and United could discharge Plaintiff at any time for any reason. Plaintiff could not maintain an action for breach of contract. No contractual relationship existed between Plaintiff and Defendant United. Since there was no contract, it necessarily follows that the arbitration clause is not a written provision *in a contract*, as is mandated by 9 U.S.C. § 2, and therefore is not a valid agreement to arbitrate under the Federal Arbitration Act.

It is well established under Alabama law that generally, an employee is terminable at will. *Howard v. Wolff Broadcasting Corporation*, 611 So.2d 307 (Ala. 1992); *McCluskey v. Unicare Health Facility, Inc.*, 484 So.2d 398 (Ala. 1986); *Kitsos v. Mobile Gas Service Corp.*, 431 So.2d 1150 (Ala.1983). In *White v. Chelsea Industries, Inc.*, 425 So.2d 1090 (Ala.1983), the plaintiff's claim that an employee handbook rose to the level of a contract of employment failed because the court held that the handbook did not vary the general common law rule that an employee is terminable at will. The Alabama Supreme Court has recognized that a plaintiff may not allege breach of contract if she is an employee at will. *Miller v. SCI Systems, Inc.*, 479 So.2d 718 (Ala. 1985). Under Alabama law, Cindy McNaughton was an employee at will of Defendant United. By the terms of United's Employee Handbook, no contract existed between McNaughton and United.

McNaughton received a copy of Defendant United HealthCare's Code of Conduct and Employee Handbook Acknowledgment form when she was originally hired by United. This form, attached hereto as Exhibit A, provides in pertinent part:

> *At-Will Employment*
>
> I understand that the provisions in this Handbook are guidelines and, except for the provisions of the Employment of arbitration Policy, **do not establish a contract** or any particular terms or condition of employment between myself and UHC. None of the policies constitute or are intended to constitute a promise of employment. I further understand that UHC

> may periodically, at its discretion, change, rescind, or add to any policies, benefits or practices with or without prior notice.
>
> I understand that the employment relationship is "at will" and is based upon the mutual consent of myself and UHC. Accordingly, I agree that UHC or I may terminate the employment relationship at any time and for any reason, with or without notice or prior discipline.

There is no question that the employment arrangement between Plaintiff and Defendants was "at-will". Where there is no presumptively valid general contract, the court's duty to compel arbitration pursuant to the Federal Arbitration Act is not triggered. *Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851 (1992). A contract did not exist between Cindy McNaughton and United Health-Care Corporation, and as such the arbitration clause is not a valid and enforceable arbitration agreement under the Federal Arbitration Act.

In *Chastain*, the Eleventh Circuit held that because there was no presumptively valid general contract, the District Court was not required to compel arbitration pursuant to the Federal Arbitration Act. *Chastain* involved a plaintiff who had not actually signed the contract that was the basis of the arbitration claim. In the present case, Plaintiff signed an acknowledgment *form*, not a contract. The arbitration clause was not part of a valid contract, and standing alone it does not constitute a contract between Plaintiff and Defendant United.

Defendants cite the New York case of *Mave v. Smith Barney*, 897 F.Supp. 100 (S.D. N.Y. 1995) in support of their claim that the arbitration clause is part of a contract.

That case held that the *arbitration agreement* was a valid contract, and is distinguishable because the language in the policy there stated "you and *we* agree to . . . submit the dispute . . . to binding arbitration." Here, United HealthCare did not agree to anything. The allegedly binding language in the policy and the handbook refers only to the employee's obligation to arbitrate. In the present case the arbitration agreement is not part of a contract, as is mandated by the Federal Arbitration Act, and Defendant United HealthCare did not mutually agree to submit all disputes to arbitration.

Defendants next allege that the arbitration agreement itself is a valid and enforceable contract. The arbitration clause is **not** a valid contract, it fails for lack of mutuality.

The Arbitration Clause is not Mutually Binding

Under Alabama law, the basic elements of a contract are an offer and acceptance, consideration, and mutual assent to the essential terms of the agreement. *Strength v. Alabama Dept. of Finance, Div. of Rish Management*, 622 So.2d 1283 (Ala.1993). The arbitration clause in the present case fails for lack of mutuality. Defendant United HealthCare did not agree to arbitrate any and all disputes arising out of the employment agreement. In fact, Defendant United HealthCare did not agree to anything at all.

United's employee handbook has a section entitled "United HealthCare Corporation Employment Arbitration Policy" which states under subpart B, Scope of Policy, as follows:

> The Policy does not require that United HealthCare initiate the arbitration process in regard to

> any dispute. In addition, **United HealthCare is not required to follow the steps of either IDR or the Policy before initiating or implementing any disciplinary action, or before asserting any claim, demand or action against an employee for breach of any restrictive covenant, wrongful disclosure of confidential information, or any other actions which may constitute a breach of contract, a breach of United HealthCare's Code of Conduct, a breach of a common law duty, or a breach or violation of either civil or criminal law.**

(Emphasis Added) (Attached hereto as Exhibit B) The United HealthCare Employee Handbook is incorporated by reference into the Code of Conduct and Employee Handbook Acknowledgment form, and the form itself states:

> **I further understand that UHC may periodically, at its discretion, change, rescind, or add to any policies, benefits or practices with or without prior notice.**

(Emphasis Added) (Attached hereto as Exhibit C) Defendant United is attempting to bind its employees to arbitration while reserving to itself the right to pursue *any form of relief it so chooses*. This behavior epitomizes unconscionability, and is precisely what our judicial system was designed to protect against.

The Alabama Supreme Court recently held that in a case involving a contract of adhesion, if it is not shown that the party in an inferior bargaining position had a meaningful choice of agreeing to arbitrate or not, and if the superior party has reserved to itself the choice of arbitration or litigation a court may deny the superior

party's motion to compel arbitration based on the doctrines of mutuality of remedy and unconscionability. *Northcom, Ltd. V. R.E. James*, 1997 WL 233918 (Ala. May. 9, 1997). There is authority in Alabama for the proposition that a contract lacking in mutuality is unenforceable. *Marcum v. Embry*, 282 So.2d 49 (Ala. 1973); *Hill v. Rice*, 67 So.2d 789 (Ala. 1953); *Hunt v. Hammonds*, 60 So.2d 355 (Ala. 1952); *Sherrill v. Alabama Appliance Co.*, 197 So. 1 (Ala. 1940). It is undoubtedly the law that a unilateral contract, that is, on which is binding on one party and not the other, will not authorize an action for breach of same by the party not bound against the one that is, *Perfection Mattress & Spring Co. V. Dupree*, 113 So. 74 (Ala. 1927). The Alabama legislature has expressed a strong policy against specific enforcement of arbitration contracts and has also adopted a strong version of the doctrine of mutuality of remedy. Alabama Code of 1975 § 8-1-43 provides as follows:

> Neither party to an obligation can be compelled specifically to perform it unless the other party thereto has performed or is compelled specifically to perform everything to which the former is entitled under the same obligation, either completely or nearly so, with full compensation for any want of entire performance.

In *Northcom* the defendant sought to arbitrate a dispute under an agreement in a contract that reserved defendants' right to obtain injunctive relief. The court found no indication that the contract was one of adhesion based on the fact that both the plaintiffs and defendants were represented by counsel and had the opportunity to negotiate the contract. In the present case the arbitration

agreement, if it were considered to be a contract, is a contract of adhesion. United HealthCare has reserved the right to change the policy in its sole discretion, in any way, at any time, without notice to anyone. United HealthCare has reserved the right to pursue claims in a judicial forum if it so desires, while at the same time attempting to bind its employees to arbitration.

Adhesion contracts refer to a standard contract form offered to consumers of goods and services essentially on a take it or leave it basis without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing to the form of the contract. *Northcom, Ltd. V. R.E. James,* 1997 WL 233918 (Ala. May 9, 1997). Defendants have admitted that plaintiff accepted employment with UHC subject to the condition that she would arbitrate all employment related disputes. (Defendants' reply to plaintiff's response in opposition to defendants' motion to stay further proceedings, p. 5-6). Plaintiff was not provided an opportunity to negotiate; the signing of the arbitration agreement was necessary to her employment. Defendants are obviously in a superior bargaining position and have given themselves the choice of doing whatever they please, while at the same time attempting to bind plaintiff with the arbitration policy. The arbitration policy in the present case is a contract of adhesion and as such as unilateral, unconscionable and unenforceable.

Hull v. Norcom, Inc., 750 F.2d 1547 (11th Cir. 1985) is a case directly on point. In *Hull* the plaintiff was a former employee who brought an action seeking damages and a claim that his employment contract was invalid because

of defendant Norcom's alleged fraud in the inducement to enter into the contract. Norcom filed a motion to compel arbitration based on an arbitration provision in the contract. The arbitration provision reserved defendant Norcom's right to a judicial forum in certain circumstances. The district court found the arbitration clause in the employment contract invalid for lack of consideration, and the Eleventh Circuit upheld that decision. The court based its holding on the fact that Norcom's obligation was illusory. The arbitration clause was not mutually binding under contract law; Norcom had reserved the option to raise and resolve disputes that it may have against another party in a court of law rather than through arbitration. The Eleventh Circuit found that the consideration underlying the agreement between Hull and Norcom was insufficient to support the enforcement of an arbitration provision which was unilaterally binding. The court went on to hold that the consideration exchanged for one party's promise to arbitrate must be the other party's promise to arbitrate at least some specified class of claims. Mere presence of an arbitration clause is insufficient to enforce the arbitration agreement. The *Hull* case is strikingly similar to the case at bar, the only difference being that in *Hull* the defendant Norcom agreed to *something*. In the present case defendant United has reserved the right to change any provision of the arbitration agreement in any way it pleases, at any time it pleases, without notice to anyone. United has reserved the right to bring suit against its employees in a court of law. United has agreed to absolutely **nothing**. The arbitration clause in the employee handbook is invalid and

unenforceable because it is not binding on defendant United HealthCare.

The Alabama Supreme Court has just recently begun to enforce arbitration clauses *in contracts*. In the case of *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. ___, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995), the United States Supreme Court held that Alabama's Code Section 8-1-43(3), which prohibited the specific enforcement of an agreement to submit a controversy to arbitration, is preempted by the Federal Arbitration Act. *Allied-Bruce* involved a termite prevention *contract*. The case that defendants cite in support of their motion to stay, *Mitsubishi Motors Corp. V. Soler Chrysler-Plymouth, Inc.*, infra, involved a contractual agreement between plaintiff and defendant. The Federal Arbitration Act provides for enforcement of arbitration agreements in a maritime transaction, regarding a controversy in existence when the agreement is signed, or *in a contract*. The arbitration agreement in the instant case is none of the above and is invalid and unenforceable. It is not part of a valid contract, and, standing alone, it is not binding on defendant United HealthCare. Plaintiff should be allowed to pursue her claims against United in the appropriate judicial forum. Under Alabama law, defendants' motion to compel arbitration is due to be denied.

V. CONCLUSION

For all of the foregoing reasons, a writ of mandamus should issue directing the circuit court to reconsider its earlier order granting defendants' motion to stay proceedings based on the Federal Arbitration Act, on the

ground that the alleged arbitration agreement is invalid and unenforceable.

PLAINTIFF RESPECTFULLY REQUESTS ORAL ARGUMENT ON THE ABOVE PETITION FOR WRIT OF MANDAMUS.

/s/ W. Lewis Garrison, Jr.
W. Lewis Garrison, Jr., GAR008

/s/ Ashley M. Taylor
Ashley M. Taylor, TAY047
Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

Plaintiff certifies that she has served a copy of the above and foregoing by hand delivery on this the 10th day of July, 1997, addressed as follows:

Edward S. Allen
Marcel L. DeBruge
Miriam Gibson Harris
Balch & Bingham LLP
1710 6th Avenue North
Birmingham, Alabama 35201

/s/ Ashley M. Taylor
OF COUNSEL

[PETITIONER'S VOLUMINOUS EXHIBITS ARE OMITTED]